Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 2000

LAWRENCE EDWARD SPETH,
Petitioner,

v.

THE STATE OF TEXAS

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals erred by holding that petitioner, a last semester chiropractic student, who had been acquitted by a jury for an alleged indecency with a sixteen year old child by touching, waived his constitutional rights to due process of law and double jeopardy, on the same day of his axquittal, by not contemporaneously objecting to the revocation of his prior probation and to the imposition of an illegal sentence for the alleged conduct he had just been acquitted of.

2. Whether the Texas Court of Criminal Appeals erred by upholding the trial court's decision that petitioner: (1) register as a sex offender; (2) pay for any counseling needed by the complainants involved in the indecency with a child charges; (3) not be allowed to work as a chiropractor for the duration of his probation; (4) participate in sex offender counseling and take a polygraph; and, (5) not have any contact with any minor girls, for the duration of his probation for the unrelated offense of aggravated assault on a police officer.

3. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution was violated when the trial judge revoked the petitioner's probation and imposed conditions of probation reserved for sex offenders which were not reasonably related to the offense of aggravated assault of a peace officer?

4. Whether Article 42.12 of the Texas Code of Criminal Procedure is unconstitutional as violative of due process to the extent it allows a person acquitted of a sex offense to have his probation revoked and be required to register as a sex offender.

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In the Supreme Court of the United States

No.

LAWRENCE EDWARD SPETH,
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THE STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

Lawrence Edward Speth respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (App. A, *infra*, 1a-13a) is reported at 6 S.W.3d 530 (1999). The opinion of the Texas Court of Appeals [14th Dist.-Houston] (App.B, *infra*, 14a-22a) is reported at 965 S.W.2d 13 (Tex. App.– [14th Dist.] 1999, writ granted) .

JURISDICTION

The Texas Court of Criminal Appeals delivered its opinion on December 1, 1999. A petition for rehearing was

not filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article 42.12 of the Texas Code of Criminal Procedure (Vernon Supp. 1999) are reproduced at App. D, *infra*, 31a-76a.

Article 62.01(5) of the Texas Code of Criminal Procedure (Vernon 1998) provides that:

"Reportable conviction or adjudication" means a conviction or adjudication, regardless of the pendency of an appeal, that is:

(A) a conviction for a violation of Section 21.11 (Indecency with a child), 22.011 (Sexual assault), 22.021 (Aggravated sexual assault), or 25.02 (Prohibited sexual conduct), Penal Code;

(B) a conviction for a violation of Section 43.05 (Compelling prostitution), 43.25 (Sexual performance by a child), or 43.26 (Possession or promotion of child pornography), Penal Code;

(C) a conviction for a violation of Section 20.04(a)(4) (Aggravated kidnaping), Penal Code, if the defendant committed the offense with intent to violate or abuse the victim sexually;

(D) a conviction for a violation of Section 30.02 (Burglary), Penal Code, if the offense is punishable under Subsection (d) of that section and the defendant committed the offense with intent to commit a felony listed in Paragraph (A) or (C);

(E) the second conviction for a violation of Section 21.08 (Indecent exposure), Penal Code;

(F) a conviction for an attempt, conspiracy, or solicitation, as defined by Chapter 15, Penal Code, to commit an offense

listed in Paragraph (A), (B), (C), or (D);

(G) an adjudication of delinquent conduct based on a violation of one of the offenses listed in Paragraph (A), (B), (C), (D), or (F) or for which two violations of the offense listed in Paragraph (E) are shown;

(H) a deferred adjudication for an offense listed in Paragraph (A), (B), (C), (D), or (F);

(I) a conviction under the laws of another state or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of an offense listed under Paragraph (A), (B), (C), (D), or (F); or

(J) the second conviction under the laws of another state or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of the offense of indecent exposure.

Art. 62.02 of the Texas Penal Code provides for registration of sex offenders:

(a) A person who has a reportable conviction or adjudication shall register or, if the person is a person for whom registration is completed under this chapter, verify registration as provided by Subsection (d), with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days. If the person does not reside or intend to reside in a municipality, the person shall register or.verify registration in any county where the person resides or intends to reside for more than seven days. The person shall satisfy the requirements of this subsection not later than the seventh day after the person's arrival in the municipality or county.

(b) The department shall provide the Texas Department of Criminal Justice, the Texas Youth Commission, the Juvenile Probation Commission, and each local law enforcement authority, county jail, and court with a form for registering persons required by this chapter to register. The

registration form shall require:

(1) the person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, social security number, driver's license number, shoe size, and home address;

(2) a photograph of the person and a complete set of the person's fingerprints;

(3) the type of offense the person was convicted of, the age of the victim, the date of conviction, and the punishment received;

(4) an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision; and

(5) any other information required by the department.

(c) Not later than the third day after a person's registering, the local law enforcement authority with whom the person registered shall send a copy of the registration form to the department.

(d) A person for whom registration is completed under this chapter shall report to the applicable local law enforcement authority to verify the information in the registration form received by the authority under this chapter. The authority shall require the person to produce proof of the person's identity and residence before the authority gives the registration form to the person for verification. If the information in the registration form is complete and accurate, the person shall verify registration by signing the form. If the information is not complete or not accurate, the person shall make any necessary additions or corrections before signing the form.

(e) A person who is required to register or verify registration under this chapter shall ensure that the person's registration form is complete and accurate with respect to each item of information required by the form in accordance

with Subsection (b).

(f) If a person subject to registration under this chapter does not move to an intended residence by the end of the seventh day after the date on which the person is released or the date on which the person leaves a previous residence, the person shall:

(1) report to the juvenile probation officer, community supervision and corrections department officer, or parole officer supervising the person by not later than the seventh day after the date on which the person is released or the date on which the person leaves a previous residence, as applicable, and provide the officer with the address of the person's temporary residence; and

(2) continue to report to the person's supervising officer not less than weekly during any period of time in which the person has not moved to an intended residence and provide the officer with the address of the person's temporary residence.

STATEMENT

1. In 1996, after a jury trial in the 208th Judicial District Court of Harris County, Texas, petitioner, a last semester chiropractic student, was acquitted of the charge of indecency with a child (a sixteen year old girl, by touching). Shortly after the acquittal, on the same day, the trial court held a hearing on the state's motion to revoke probation based on the identical conduct for which the petitioner had just been acquitted of. The petitioner was on a five year deferred adjudication for aggravated assault of a police officer.App. B, *infra,* 15a. At the revocation hearing, the petitioner acknowledged that he was willing to do anything to keep from going to prison. App.A, *infra*, 8a. The trial judge found the allegations of the motion to revoke to be true, revoked the

probation of the petitioner, ordered petitioner jailed for 180 days, imposed a $250.00 fine, and granted ten years probation, subject to five conditions which related to the acquitted indecency charges, as conditions of his probation in his aggravated assault of a peace officer case, as follows: (1) register as a sex offender; (2) pay for counseling needed by the complainants in the indecency with a child case; (3) refrain from working as a chiropractor during the probationary period; (4) participate in sex offender counseling and take a polygraph; (5) refrain from contact with any minor girls for the duration of probation. App. B, *infra,* 15a-16a.

The State argued the petitioner had procedurally defaulted on any claims concerning the probation conditions by failing to make a contemporaneous trial objection. The probation revocation hearing was heard by the same trial judge as presided over the acquittal on the same day the indecency trial concluded and did not involve a jury. The 14th Court of Appeals rejected the state's contention and ordered a reformation of the probation terms on the ground that petitioner could raise "a defect in his sentence" even though he had not objected to it at trial. App. B, *infra,* 16a. The Texas Court of Criminal Appeals granted review to decide "whether a defendant can challenge conditions of probation for the first time on appeal." App. A, *infra,* 9a. The Texas Court of Criminal Appeals decided that petitioner waived his complaints, simply because he did not object at the revocation hearing.

Petitioner had timely complained about the sentence in his motion for new trial filed on April 11, 1996.App.C, *infra*, 21a-30a. See *Lilly v. Virginia*, __ U.S. __, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). The trial court still had jurisdiction to reconsider its erroneous rulings and cure the defects, but chose not to. In particular, petitioner claimed in his motion

for new trial that:

> A. The Court committed a material error calculated to injure the rights of the accused. The Court adjudicated Defendant on the Motion to Adjudicate (First Amended) despite the fact that a jury of twelve men and women acquitted Defendant of the exact same conduct that was tried in the case in chief. Defendant has been denied due process of law, equal protection of the law, is barred from being adjudicated for the same conduct as was the basis of the trial on the basis of res judicata, judicial estoppel and double jeopardy. App. A, *infra*,21a-22a.
>
> ....C. The Court committed a material error calculated to injure the rights of the accused. The continuation and modification of Defendant's Community Supervision exceeds the authority of Article 42.12, Section 22, as follows:
>
> 1.The total period of community supervision cannot exceed ten (10) years. The Court erroneously ordered an additional ten (10) years of community Supervision.
>
> a. The Court cannot order a polygraph examination
>
> b. The Court cannot order sex therapy.
>
> c. The Court cannot order Defendant not to be a Chiropractor.
>
> d. The Court cannot order the Defendant not to be with females under the age of eighteen (18) years.
>
> e. The Court cannot order the Defendant into a sex offender program.
>
> f. The Court cannot order the Defendant to report as a sex offender.

g. The Court cannot order the Defendant be identified as a sex offender....

VI.

...The court erred when it denied Defendant's Motion for Directed Verdict of Acquittal/Finding of NOT True where the basis of the criminal charge filed against the Defendant and the Motion to Adjudicate (First Amended) concerned the exact same conduct that was tried in the case in chief and that a jury of twelve men and women acquitted Defendant of. Defendant asserts that Article 42.12 of the Texas Code of Criminal Procedure is unconstitutional and violative of the Due Process Clause and the Equal Protection Clause of the Constitution of the United States of America, as well as the Constitution of the State of Texas. Specifically, Defendant asserts that Article 42.12 of the Texas Code of Criminal Procedure allows a person, including the Defendant, to be tried and convicted of a criminal offense by a mere "preponderance of the evidence" rather than the constitutionally required "beyond a reasonable doubt". The application of the "by a preponderance of the evidence" standard renders Article 42.12 impermissibly vague and indefinite. Defendant asserts that due process and equal protection under the law require that the Defendant be tried by a jury, as was demanded, and if convicted, the evidence of the conviction would allow the court to

> adjudicate him upon finding the conviction to be legally valid by a preponderance of the evidence. Allowing the court to try the Defendant by a mere preponderance of the evidence allows the court to "convict" by an impermissibly lower evidentiary standard than is mandated by our Constitutions. To take away the liberty guaranteed to the Defendant under such circumstance, especially when a jury acquitted him, violates Defendant's constitutional rights....

3. The 14th Court of Appeals correctly determined that "a trial court cannot impose conditions as punishment for criminal charges on which the defendant was acquitted." App. B, *infra*, 15a. The 14th Court of Appeals never used the words "double jeopardy" in its opinion, but such a determination was implicit in its decision. App. B, *infra*, 16a, 17a, 18a, 19a. The 14th Court of Appeals also held that the district court erred in imposing the requirement to register as a sex offender because:

> there is no reasonable connection between a conviction for aggravated assault of a peace officer and the necessity for registration as a sex offender. See Tex. Code Crim. Proc. Ann. art. 62.01(5) (Vernon Supp. 1998). Second, we can only surmise that the condition Petitioner register as a sex offender was imposed as a means of punishment for the indecency with a child charge. Because Petitioner had been acquitted of that charge, however, the condition was an invalid attempt to circumvent the jury's verdict. App., *infra*, 16a.

The 14th Court of Appeals ordered the conditions that petitioner register as a sex offender, pay for any counseling needed by the complaining witnesses, not pursue his chosen profession as a chiropractor, and have no contact with any minor girls for the duration of his probation, be deleted from the list of his probationary conditions. App., *infra*, 16a., 17a, 19a, and 20a.

4. The Texas Court of Criminal Appeals reversed the 14th Court of Appeals holding that petitioner's counsel did not object at the revocation hearing and could not complain about the error for the first time on appeal. App. A, *infra*, 9a. The court did not address the issues of due process, double jeopardy or the petitioner's motion for new trial. The motion for new trial timely raised the issues asserted by petitioner.

REASONS FOR GRANTING THE PETITION

The judgment of the Texas Court of Criminal Appeals upholding the violation of petitioner's constitutional rights to due process of law and to be free from double jeopardy, simply because his counsel did not contemporaneously object in the hearing, cannot be upheld. The motion for new trial filed by petitioner timely complained of the unauthorized revocation and probation requirements imposed by the trial court. It was clear that the trial judge was determined to circumvent the decision of the jury to acquit petitioner for indecency with a child. App., *infra*, 16a., 17a, 19a, and 20a. It is inconceivable that petitioner can waive his substantial constitutional rights of due process and double jeopardy based on a procedural default. Particularly when the result is the requirement to register as a sex offender for a non-sex related offense. Also at issue is whether a probationer's substantive due process rights are infringed upon by subjecting him to conditions of probation that are not

supported by the evidence and wholly unrelated to the crime for which the individual was originally placed on probation. Therefore, review by this Court is warranted.

1. The double jeopardy clause of the Federal Constitution's Fifth Amendment embodies three protections:

> (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. Under the double jeopardy clause of the Federal Constitution's Fifth Amendment, successive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of enhanced sentences; underlying the double jeopardy clause is the idea that the state, with all its resources and power, should not be allowed to make repeated attempts to convict individuals for alleged offenses, thereby subjecting them to embarrassment, expense, and ordeal and compelling them to live in a continuing state of anxiety and insecurity; other concerns are (1) that multiple prosecutions give the state an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged, and (2) that when a state can bring multiple charges against an individual, a tremendous additional burden is placed on that defendant if the defendant must face each of the charges in a separate proceeding.

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U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990). Additionally, the double jeopardy clause of the Federal Constitution's Fifth Amendment is applicable to the states through the Federal Constitution's Fourteenth Amendment. *Id.* Petitioner's revocation and probation conditions violated his right to be free from double jeopardy and must be vacated.

2. The "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974). The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the judge's ability to revoke a defendant's probation. *Bearden v. Georgia,* 461 U.S. 660, 666 (1983) (recognized substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution). Although the standard is not demanding, given the breadth of reasons that can justify revocation, it does impose substantive outer boundaries on revocation decisions. Accordingly, a trial judge's decision to revoke probation must be rationally justifiable when compared to the nature of the alleged violation. *Cf., Missouri Department of Corrections and Human Resources v. Romano*; 471 U.S. 606, 105 S. Ct. 2254, 85 L. Ed.2d 636 (1985).

In explaining situations where a revocation would not be justified, Justice Marshall opined, "...No doubt a violation may stir certain biases in judges who believe they have 'taken a chance' on a probationer or in probation officers who feel personally at fault, but those biases do not authorize revocations that are solely vindictive or reflexive...." *Romano*; 471 U.S. 606, 105 S. Ct. 2254, 85 L. Ed.2d 636 (1985) (Marshall, J., concurring in result). Instead, given the nature of the liberty interest at stake, revocation must reflect a considered judgment that the punishment is necessary

because the original terms of probation are no longer appropriate to satisfy the State's legitimate penological interests. *Id.; See, Williams v. Illinois,* 399 U.S. 235, 265 (1970) (Harlan, J., concurring in result).

A probationer is also afforded procedural safeguards at a revocation hearing. In identifying the procedural requirements of due process, this Court has noted that the decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation. *See Gagnon v. Scarpelli,* 411 U.S. 778, 784 (1973); *cf., Morrissey v. Brewer,* 408 U.S. 471, 479-480 (1972) (parole revocation). Probationers have an obvious interest in retaining their conditional liberty, and the State also has an interest in assuring that revocation proceedings are based on accurate findings of fact and, where appropriate, the informed exercise of discretion. *Gagnon, supra, at 785.* In *Gagnon*, this Court concluded that the procedures outlined for parole revocation hearings should also apply to probation proceedings. *Gagnon,* 411 U.S. at 782. Thus, the final revocation of probation must be preceded by a hearing. The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the fact finder as to the evidence relied on and the reasons for revoking probation. *Id.,* at 786. The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation. *Id.,* at 790. Thus, by holding the Due Process Clause of the Fourteenth Amendment applies to probation revocation hearings, this

Court has established that a trial judge does not have unfettered discretion in revoking an individual's probation.

3. A trial judge's decision to revoke an individual's probation is unconstitutional when there is no evidence to support the revocation. In *Douglas v. Buder*, 412 U.S. 430, 432, 93 S. Ct. 2199, 37 L. Ed.2d 52 (1973), this Court held revocations of probation are invalid under the Due Process Clause of the Fourteenth Amendment unless supported by the evidence. *See also*, *United States v. Brown*, 699 F.2d 704, 711 (5th Cir. 1983) (holding the defendant could be ordered to pay restitution but only for each count upon which he was convicted); *Gordon v. Texas*, 707 S.W.2d 626 (Tex. Crim. App. 1986) (where appellant was found guilty only of pulling complainant's hair, he was ordered as a condition of probation to pay for funeral expenses arising from complainant's death. The court stated, "To allow the trial court to order appellant to pay the expenses occasioned by a crime for which the jury had found him not responsible would be a similar circumvention of the jury's verdict. It would allow punishment to be imposed for a crime of which appellant was acquitted."). In *Buder*, a truck driver with no prior offenses, pled guilty to two counts of manslaughter and was given a suspended sentence and placed on probation for a period of four years. *Id.* at 430. One of the conditions of probation was that all arrests for any reason must be reported without delay to the defendant's probation and parole officer. *Id.* Three months after pleading guilty, the defendant was involved in an accident and issued a citation for driving too fast for existing conditions. *Id.* at 431. At the next scheduled meeting with his probation officer, eleven days after the accident, the defendant mentioned the accident and the receipt of the traffic citation. *Id.* The probation officer reported the information to the trial judge who thereupon scheduled a hearing for the purpose of determining whether

the defendant's probation should be revoked. *Id.* At the hearing, the judge stated that the defendant's failure to report the accident and the traffic citation "displayed poor attitude toward his probation" and was not in "strict compliance with the terms of the probation," revoked probation, and sentenced the defendant to concurrent terms of two years on each of the original two counts. *Id.* This Court determined the judge's decision to revoke the defendant's probation violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 432. This Court held that the issuance of a traffic citation was not an "arrest" under Missouri or Arkansas law because the record failed to disclose any evidence that the defendant was subjected to an actual restraint or taken into custody. Consequently, the Court concluded that the finding that the defendant had violated the conditions of his probation by failing to report "all arrests . . . without delay" was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment. *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed.2d 52 (1973); *Thompson v. Louisville,* 362 U.S. 199 (1960); *Garner v. Louisiana,* 368 U.S. 157 (1961).

The facts of this case are analogous to the *Buder* opinion. Due process considerations require that there must be evidence in the record to show that the conditions placed on petitioner had a factual basis. It is undisputed that petitioner was present at the scene of the alleged offense. In light of the jury's finding that petitioner had no criminal responsibility for the alleged sexual acts, however, that mere presence was not a sufficient factual basis for the trial court to revoke petitioner 's probation. Since the jury was the fact finder in the case and had already acquitted petitioner of any wrongdoing, there is no evidence in the record to support the trial court's decision to revoke petitioner's probation. Thus, the trial judge's finding that petitioner had violated the

conditions of his probation by engaging in conduct for which he was just acquitted was totally devoid of evidentiary support. Accordingly, the trial court's decision to revoke petitioner 's probation was invalid under the Due Process Clause of the Fourteenth Amendment. Furthermore, the trial court's attempt to substitute its own findings for those of the jury also violates petitioner's constitutional right to due process of law and protection against double jeopardy.

4. After wrongfully revoking petitioner's probation on the aggravated assault conviction, the trial court imposed numerous unauthorized conditions on petitioner, including the following: (1) that he register as a sex offender; (2) that he pay for any counseling needed by the complainants involved in the indecency with a child charges; (3) that he not be allowed to work as a chiropractor for the duration of his probation; (4) that he participate in sex offender counseling and take a polygraph; and (5) that he not have any contact with any minor girls for the duration of his probation. The conditions prescribed by the trial judge constitute intrusions on petitioner's constitutionally protected freedoms and are unrelated to petitioner's prior conviction for aggravated assault of a peace officer. Since there is no rational relationship between the conditions imposed by the trial judge and petitioner's probation for aggravated assault of a peace officer, the conditions are arbitrary and capricious in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Ninth Circuit has developed a test to determine whether a probation condition is unduly intrusive on constitutionally protected freedoms. The test requires that the conditions must be "reasonably related" to: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate

needs of law enforcement. *United States v. Tonry*, 605 F.2d 144 (5th Cir. October 9, 1979); *United States v. Pierce,* 561 F.2d 735, 739 (9 Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S. Ct. 1486, 55 L. Ed. 2d 516 (1978). Similarly, a Texas trial court cannot impose conditions unless they bear a reasonable relationship to the treatment of the accused and the protection of the public *See*, *Gordon v. State*, 707 S.W.2d 626, 629-30 (Tex. Crim. App. 1986); Tex. Code Crim. Pro. Art. 42.12 §11 (permitting a trial judge to "impose any reasonable condition . . . designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.").

Applying this test to the present case, the probation conditions imposed on petitioner are unconstitutional because they are unduly intrusive on constitutionally protected freedoms and bear absolutely no relationship to the treatment of petitioner for aggravated assault of a peace officer or for the protection of the public's probation on the aggravated assault conviction.

5. The revocation of petitioner's probation and imposition of the condition requiring petitioner to register as a sex offender is unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment. Petitioner is not required to register as a sex offender, under article 42.12, section 11(e), article 62.01, and article 62.02 of the Texas Code of Criminal Procedure, for the offense of aggravated assault of a peace officer, and, therefore, the condition is unreasonably imposed. There is no reasonable connection between a conviction for aggravated assault of a peace officer and the necessity for registration as a sex offender. Secondly, the condition petitioner register as a sex offender was imposed as a means of punishment for the indecency with a child charge. Because petitioner had been acquitted of that charge, however, the condition was an invalid attempt to

circumvent the jury's verdict. The Double Jeopardy Clause of the Fifth and Fourteenth Amendment to the United States Constitution prohibit trial courts from ignoring a jury's verdict by requiring an individual acquitted of a sexual offense to register as a sex offender despite the acquittal. Additionally, Courts may not prescribe greater punishment than the legislature intended. *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). The Texas legislature obviously intended sex offender registration to be required of persons "convicted" of sex offenses, not acquitted of them. App. E, *infra*, 77a. For these reasons, petitioner respectfully requests the Court find that the condition that petitioner register as a sex offender is unconstitutional and requests the item be deleted from the list of his probationary conditions

6. The condition that Petitioner pay for any counseling needed by the complaining witnesses is unauthorized by law, unreasonable, and is unenforceable due to overbroadness. The requirement is not reasonably related to petitioner's prior conviction for aggravated assault of a peace officer. Upon review of the applicable state statutes, it is apparent the trial court was attempting to punish petitioner for the sexual conduct alleged in the indecency with a child indictment.

Article 42.12, section 11(b) of the Texas Code of Criminal Procedure specifically limits the trial judge's authority to order monetary payments:

> [a] judge may not order a defendant to make any payments as a term or condition of community supervision, except for fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the defendant or otherwise expressly authorized by law. The court shall consider the ability of the defendant to make

> payments in ordering the defendant to make payments under this article.

Section 14(b) of the same article sets out further conditions for monetary payments to be made by probationers convicted of "Child Abuse, Sex Offenders, and Family Violence Offenders,"

> If the court grants probation to a person convicted of an offense under Section 21.11 [Indecency with a Child], 22.011 [Sexual Assault], 22.021 [Aggravated Sexual Assault], or 22.04 [Injury to a Child, Elderly Individual, or Disabled Individual], Penal Code, the court . . . may require the probationer to pay all or a part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense, upon a finding that the probationer is financially able to make payment. Any payments ordered under this subsection may not extend past one year from the date of the order. Tex. Code Crim. Proc. Ann. art. 42.12, § 14(b). (Emphasis supplied).

7. The trial court's imposition of the condition requiring petitioner to pay for "any counseling or therapy" needed by the complaining witnesses in the indecency with a child action is unreasonable under both of the Texas statutes. The condition by the trial court is overly broad because it failed to limit the counseling to one year as required by section 14(b). Moreover, the condition was clearly imposed by the trial court as punishment for the indecency with a child offense, a charge of which petitioner had been acquitted. Due process mandates that the trial court not be permitted to circumvent the jury's verdict in such a manner. Accordingly, petitioner requests the Court reform the probationary order to delete

the requirement that he pay for any and all counseling required by the complaining witnesses from his conditions of probations on the grounds they violate the Due Process Clause of the Fourteenth Amendment.

8. The trial court's requirement that petitioner participate in sex offender counseling and take and pay for a polygraph examination is also unreasonable. There is no reasonable relationship between participating in sex offender counseling and assaulting a police officer. Moreover, police officers will not be protected by petitioner's mandatory attendance in sex offender counseling. Likewise, a mandatory polygraph exam does not protect police officers from danger nor does it relate to the crime of aggravated assault of a peace officer. Both of these conditions are clearly imposed as punishment for the indecency with a child charge. The requirement is, thus, invalid as punishment for a charge to which petitioner was previously acquitted. For these reasons, petitioner respectfully requests the Court find that the conditions requiring him to participate in sex offender counseling and take a polygraph examination are unconstitutional and should be removed from the list of his probationary conditions.

9. Forbidding petitioner from working as a chiropractor is an unreasonable restraint on his constitutional right to work. The condition imposed by the trial court deprives petitioner of "liberty" within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. *Peters v. Hobby*, 349 U.S. 331, 75 S. Ct. 790, 99 L. Ed.1129 (1955) (Douglas, J., concurring in result). When a man is deprived of that "liberty" without a fair trial, he is denied due process of law. *Id.*

The condition restricting Petitioner from pursuing his chosen profession is clearly unreasonable in the sense that it has no relationship to his crime of aggravated assault of a peace officer and it prohibits him from conduct which is not

criminal in itself. The State has argued, however, the condition is reasonably related to the protection of the public and addresses the potential future criminality of Petitioner. The State has asserted Petitioner's repeated improper touching of persons requires a condition preventing his performance of the duties of a chiropractor because those duties necessarily require the touching of patients.

10. Petitioner's aggravated assault of a peace officer does not evidence a proclivity for improper touching of individuals such that the trial court can completely bar him from practicing his chosen career. The trial court's blanket restraint on Petitioner's practice as a chiropractor is, thus, unreasonable in relation to his crime. Moreover, the trial court violated Petitioner's due process and double jeopardy protections by considering the charge of indecency with a child to show Petitioner's repeated improper touching of persons because he was specifically acquitted of the charge.

11. The condition that Petitioner have no contact with any minor girls for the duration of his probation is not authorized, as well as overbroad, ambiguous and unenforceable. The condition has no relation whatsoever to petitioner's conviction for an aggravated assault of a peace officer, and the condition thus represents an impermissible requirement, which, if permitted, would effectively circumvent the jury's not-guilty verdict in the indecency with a child action. Furthermore, even if the condition could be said to be related to an offense for which Petitioner had been convicted, the condition would remain unreasonable due to its indefiniteness. The conditions of probation, like any criminal statute, should be clear, explicit, and unambiguous, so that the probationer understands what is expected of him and prevents an arbitrary and unreasonable enforcement of the condition. "Contact" is defined to mean several things: the physical union of surfaces; a simple association, whether

verbal or not, with another person; or the establishment of communication with another. *See*, Webster's Ninth New Collegiate Dictionary 282 (private library ed. 1991). Based on the varying definitions of contact, Petitioner, in the extreme, could be prohibited from walking down the street and saying "hello" to any female or simply from establishing physical contact, handshake or otherwise, with a minor female. Therefore, the condition is unreasonable because it fails to give petitioner notice of what is expected of him and invites arbitrary enforcement of the condition.

12. The decision of the Texas Court of Criminal Appeals to uphold the unauthorized revocation of petitioner's probation and to place invalid sex offender restrictions on him, was predicated on the conclusion that petitioner did not make a contemporaneous objection at the revocation hearing. App. A, *infra*, 9a. The petitioner did timely file a motion for new trial complaining of the improper sentence. App. C, *infra*, 21a. The 14th Court of Appeals noted that:

> Speth admits he stated during the punishment hearing that he would be willing to attend psychological counseling, but asserts "the choice to reject probation and go to prison or accept the probationary choice was really no choice at all." . . . . Instead of being confronted by the trial court with the Hobson's choice of probation over prison, however, Speth himself originated the idea of sex offender counseling as a means of gaining probation. App. B, *infra*, 18a.

The state claimed in the 14th Court of Appeals that petitioner waived his complaints by not objecting at the revocation hearing. The 14th Court of Appeals correctly determined that an "appellant is not barred from raising a defect in his sentence for the first time on appeal." App. B,

infra, 15a. This Court has stated that "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965). In this regard,

> Whether a particular right of a criminal defendant is waivable, whether the defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

United States v. Olano, et al., 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). "With respect to the rights of criminal defendants, waiver is different from forfeiture: whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.* Petitioner, by not making a contemporaneous objection may have committed "forfeiture", but not "waiver". Petitioner clearly never intended to waive his federal constitutional rights.

Petitioner's failure to object to his revocation and unauthorized probation conditions was not prompted by litigation strategy. As is clear in his testimony, he wanted to avoid a prison term for allegations he had just been acquitted of. App. A, *infra*, 8a. He did not waive his federal rights merely by failure to object at the time of the trial judge's revocation of his probation and imposition of sex offender conditions of probation because he did not want to go to prison. *Henry*, *Id.* Additionally, petitioner timely filed a motion for new trial that brought to the attention of the trial judge her erroneous rulings. App. C, *infra*, 21a. Therefore, it is clear that petitioner did not "deliberately waive" his

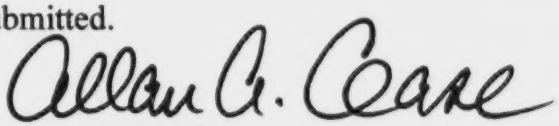
constitutional rights by any sort of trial strategy so as to preclude relief by this Court.

Accordingly, petitioner requests that the Court set aside the probation revocation and order petitioner released from his deferred adjudication for aggravated assault of a police officer, as the deferred period has concluded; alternatively, order petitioner reinstated on his deferred adjudication for aggravated assault of a police officer and reform the probationary order to delete the sex offender conditions from the list of probationary conditions imposed by the trial judge; alternatively, that in the interests of sound judicial administration this Court remand this case to permit the state to establish whether or not there was a waiver of federal rights by the failure to make a contemporaneous objection at the revocation hearing; alternatively, reform the judgment of the Texas Court of Criminal Appeals to delete the sex offender probation conditions from petitioner's probation; and, that this Court grant such other and further relief as it may deem just and proper in this cause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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FEBRUARY 2000

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 2000

LAWRENCE EDWARD SPETH,
Petitioner,

v.

THE STATE OF TEXAS

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

LAWRENCE EDWARD SPETH, Appellant
v.
THE STATE OF TEXAS

NO. 425-98

COURT OF CRIMINAL APPEALS OF TEXAS

6 S.W.3d 530; 1999 Tex. Crim. App. LEXIS 134

December 1, 1999, Delivered

PRIOR HISTORY: ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY.

DISPOSITION: The judgment of the Court of Appeals is reversed.

CORE TERMS: sentence, community supervision, probation, void, contractual, confinement, counseling, nonwaiveable, indecency, clemency, sex offender, discretionary, universe, objected, systemic, fine, sentencing, continuum, aggravated assault, affirmatively, eligible, serving, waived, penitentiary, complain, revocation of probation, conditions of probation, reasonable condition, specific objection, years probation

COUNSEL: George McCall Secrest, Jr., Houston.

Carol M. Cameron, Assist. DA, Houston.

JUDGES: Meyers, J., delivered the opinion of the Court, joined by Mansfield, Price, Johnson, and Keasler., J.J.. Womack, J., filed a concurring opinion, joined by McCormick, P.J., Keller, and Holland, J.J..

OPINIONBY: MEYERS

OPINION:

Adjudication of appellant's guilt for the offense of aggravated assault of a peace officer was deferred and he was awarded five years probation. While on probation, appellant was indicted for indecency with a child. Appellant was acquitted by a jury on the indecency charges, the trial court in the aggravated assault case found the allegations concerning the indecency offense true and concluded appellant had thereby violated his probation. Appellant's guilt was adjudicated and the trial court granted ten years probation, subject to five conditions which related to the indecency charges. n1 Appellant did not object to the conditions at trial, but complained about them for the first time on direct appeal. The State argued appellant had procedurally defaulted his claim by failing to make a trial objection. The Court of Appeals rejected that contention on the ground that appellant could raise "a defect in his sentence" even though he had not objected to it at trial." *Speth v. State*, 965 S.W.2d 13, 15 (Tex. App.--Houston [14th Dist.] 1998). We granted review to decide "whether a defendant can challenge conditions of probation for the first time on appeal.

n1 As conditions of his probation in his aggravated assault of a peace officer case, appellant was required to: (1) register as a sex offender; (2) pay for counseling

needed by the complainants in the indecency with a child case; (3) refrain from working as chiropractor during the probationary period; (4) participate in sex offender counseling and take a polygraph; (5) refrain from contact with any minor girls for the duration of probation.

The Court of Appeals' holding and appellant's arguments turn on a line of cases which hold that "if a punishment is not authorized by law, that portion of the sentence imposing that punishment is void." *Heath v. State,* 817 S.W.2d 335, 336 (Tex. Crim. App. 1991)(opinion on original submission)(portion of sentence granting probation where defendant not eligible for probation under controlling statute held void and could be raised at any time) n2; see also *Hern v. State,* 892 S.W.2d 894, 896 (Tex. Crim. App. 1994)("conviction was void because the sentence exceeded the maximum allowed for a third degree felony, of which [the defendant] had been convicted"), cert. denied, 515 U.S. 1105, 132 L. Ed. 2d 259, 115 S. Ct. 2252 (1995); *Ex parte Johnson,* 697 S.W.2d 605, 606-607 (Tex. Crim. App. 1985)(imposition of fine in addition to prison term not "authorized by law" and therefore void); *Wilson v. State,* 677 S.W.2d 518, 524 (Tex. Crim. App. 1984)(where punishment was assessed at four years confinement, but statutory minimum was five years confinement, judgment of conviction was void). Nearly every case that has held a sentence not "authorized by law" or void (such that the alleged defect could be raised for the first time on appeal) involved the trial court's assessment of a punishment that was not applicable to the offense under the controlling statutes. That is, "the punishment assessed was not within the universe of punishments applicable to the offense." *Johnson,* 697 S.W.2d at 607. These cases are inapposite here because they involve the imposition of a

sentence not authorized by statute, while community supervision is not a sentence or even a part of a sentence.

n2 The Court of Appeals relied on one of its own decisions, *Martinez v. State*, 874 S.W.2d 267, 268 (Tex. App.--Houston [14th Dist.] 1994), which in turn relied on *Heath v. State*, 817 S.W.2d 335 (Tex. Crim. App. 1991), for the proposition that the defendant was not "barred from raising a defect in his sentence for the first time on appeal."

The Code of Criminal Procedure defines community supervision as involving a suspension of the sentence. n3 In other words, community supervision is an arrangement in lieu of the sentence, not as part of the sentence. TEX. CODE CRIM. PROC. art. 42.12 § 3(a)(providing that a judge, after conviction or plea "may suspend the imposition of the sentence and place the defendant on community supervision"); see also fn.3, supra.

n3 Probation is referred to in the Code of Criminal Procedure as "community supervision." We use the terms probation and community supervision interchangeably in this opinion. Community supervision is defined in the Code as:

The placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period of time during which:

(A) criminal proceedings are deferred without an adjudication of guilt; or

> (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.
>
> TEX. CODE CRIM. PROC. art. 42.12 § 2(2)(emphasis added).

The sentence and the conditions of community supervision are each separate parts of the "judgment." n4 The Code lists twenty-six items the judgment should reflect, including "the length of community supervision, and the conditions of community supervision" and "the term of the sentence." Id. at § l(10) & (15). That community supervision is not viewed as part of the sentence is further evidenced by the fact that these terms are listed as separate items in the "judgment." So, while community supervision is part of the judgment, it is not part of the "sentence," as those terms are defined in the Code of Criminal Procedure. Cf. *State v. Ross*, 953 S.W.2d 748 (Tex. Crim. App. 1997).

> n4 "Sentence" is defined as "that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law." TEX. CODE CRIM. PROC. art. 42.02. The Code defines "judgment" as the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant. The sentence served shall be based on the information contained in the judgment.
>
> Id. at art. 42.01.

Moreover, imposition of a sentence is profoundly different from the granting of community supervision. The above cases suggest that a defendant has an absolute and nonwaiveable right to be sentenced within the proper range of punishment established by the Legislature. n5 The granting of community supervision is a privilege, not a right. See *Flores v. State*, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995)(plurality opinion)("there is no fundamental right to receive probation; it is within the discretion of the trial court to determine whether an individual defendant is entitled to probation"), *cert. denied*, 516 U.S. 1050, 133 L. Ed. 2d 670, 116 S. Ct. 716 (1996); *Burns v. State, 561 S.W.2d 516, 517 (Tex. Crim. App. 1978)*(court's discretion to deny or grant community supervision to eligible defendant if jury waived or jury not elected to determine punishment is absolute and unreviewable). The decision whether to grant probation is wholly discretionary and nonreviewable. *Flournoy v. State*, 589 S.W.2d 705, 707 (Tex. Crim. App. 1979)(citing *Saldana v. State*, 493 S.W.2d 778 (Tex. Crim. App. 1973). To even be eligible for jury recommended probation, a defendant bears the burden of pleading and proving that he has no prior felony convictions. TEX. CODE CRIM. PROC. art. 42.12 § 4(d) & (e). We have likened the granting of probation to an extension of clemency that is contractual in nature:

When probation is granted, the trial court "extends clemency" and creates a relationship that is, "in a way, contractual that is, the court agrees with the convict that clemency by way of probation will be extended if he will keep and perform certain requirements and conditions, the violation of which will authorize the revocation of the probation." *Wilson v. State*, 156 Tex. Crim. 228, 240 S.W.2d 774, 775 (1951), *Gossett v. State*, 162 Tex. Crim. 52, 282

S.W.2d 59, 60 (1955), *Bradley v. State*, 564 S.W.2d 727, 729 (1978).*Flournoy*, 589 S.W.2d at 707 (footnotes omitted).

> n5 We generally view our adversarial system as including three kinds of "rights": (1) absolute systemic requirements and prohibitions that are nonwaiveable, (2) rights of litigants that must be implemented unless expressly waived, and (3) rights that must be insisted upon at trial or nothing is presented for review. *Marin v. State*, 851 S.W.2d 275, 278-80 (Tex. Crim. App. 1993), overruled on other grounds, *Cain v. State*, 947 S.W.2d 262, 265 (Tex. Crim. App. 1997)(holding failure to admonish defendant concerning deportation consequences of plea subject to harmless error analysis).
>
> While not expressed in these terms, the case law discussed above involving "void" sentences has viewed legislatively defined sentencing schemes that are explicit about the applicable range or category of punishment as absolute, systemic features of the system, such that their application cannot be waived. That is, a defendant's "right" to be sentenced to a term within the defined "universe of punishments applicable to the offense" is absolute and nonwaiveable. The question presented in this case is whether Section 11, governing the imposition of conditions of probation, creates a "universe of punishments" applicable to an offense which is absolute and nonwaiveable.

Consistent with its broad discretionary powers in deciding whether to grant community supervision, a trial court likewise has broad discretion in determining the conditions to be imposed. The trial court "shall" determine the conditions of community supervision, n6 but the description of

allowable conditions is prefaced with the permissive term "may": "The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." n7 TEX. CODE CRIM. PROC. art. 42.12 § 11(a); see also *Chacon v. State*, 558 S.W.2d 874, 875 (Tex. Crim. App. 1977)(condition of probation must be "a reasonable one"). The broadly discretionary language characteristic of this provision is markedly different from the sentencing provisions in which the legislature has established the allowable range of punishment for a given offense. Under those schemes, every option available to the court is narrowly identified on the face of the statute. Because Section 11 is so broadly discretionary, it does not establish a narrowly identifiable "universe or punishments applicable to the offense" in the same manner as the statutory sentencing schemes at issue in the above cases. n8

n6 The definition of community supervision includes the imposition of conditions:

"Community supervision" means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period . . .

TEX. CODE CRIM. PROC. art. 42.12 § 2(2) (emphasis added).

n7 Section 11 further provides a nonexclusive list of examples of conditions that a court "may" impose. TEX. CODE CRIM. PROC. art. 42.12 § 11(a).

n8 There are two exceptions to Section 11's permissive tone--a provision prohibiting the imposition of certain payments, TEX. CODE CRIM. PROC. art. 42.12 § 11 (b), and another provision prohibiting a requirement that a defendant undergo an orchiectomy, TEX. CODE CRIM. PROC. art. at 42.12 § 11(f). By treating these matters in prohibitory terms, the Legislature has provided that they are per se unreasonable. But a defendant can affirmatively waive unreasonable terms by entering into the probation contract containing such terms, without objection. Cf. *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998)(holding statutes of limitations no longer viewed as systemic nonwaiveable features in part because they operate as a defense and therefore the defendant "ought to have the burden of asserting that defense or losing it"); *Ex parte McJunkins*, 954 S.W.2d 39, 40 (Tex. Crim. App. 1997)(because, per Code of Criminal Procedure article 21.24, State has option whether or not to join offenses in single criminal action, and defendant has option (in event State chooses joinder) whether or not to demand severance, then Penal Code *section 3.03* mandating that sentences in such consolidated cases run concurrently, is "a right of a litigant rather than an absolute requirement or prohibition which cannot be waived or forfeited").

An award of community supervision is not a right, but a contractual privilege, and conditions thereof are terms of the contract entered into between the trial court and the defendant. Therefore, conditions not objected to are affirmatively accepted as terms of the contract. Thus, by entering into the contractual relationship without objection, a defendant affirmatively waives any rights encroached upon by the terms of the contract. A defendant who benefits from the contractual privilege of probation, the granting of which

does not involve a systemic right or prohibition, must complain at trial to conditions he finds objectionable. n9 A trial objection allows the trial court the opportunity to either risk abusing his discretion by imposing the condition over objection (n10) or reconsider the desirability of the contract without the objectionable condition.

n9 This assumes the probationer knew what the conditions were in time to object at trial. In the instant case, appellant was questioned about potential conditions, was orally informed by the trial court of the conditions assessed, and signed a written version of the conditions at the punishment hearing following adjudication of guilt. Some of the questioning at the hearing demonstrates appellant's willingness to accept the conditions as part of the bargain by which he would benefit from the privilege of probation:

Q.[Defense counsel] Are you willing to attend sex offender counseling?

A. If that's what the Judge says.

Q. Are you willing to do that?

A. Yes.

Q. Are you asking the Court to let you stay with the family [appellant's wife and children]?

A. Yes.

* * *

Q.[Prosecutor] What are you asking the Court to do?

A. . . . I just want to have some time with my family and be able to work things out. If she wants me to go to counseling, fine.

Q. . . . Do you think you need [sex offender] counseling?

A. I didn't do it but I'm willing to go through counseling, yes.

Q. You would do anything to stay out of the penitentiary?

THE COURT: You have to answer the question.

A. Yes.

In closing argument on punishment, defense counsel argued to the court:

. . . If you require that he be sent to sex offender therapy, he'll do it. In the past he's done whatever he's been required to do. . . . It's not a case where he should go to the penitentiary. We ask that you not send him to the penitentiary. . . ..

n10 We do not hold that a trial court does not abuse its discretion by imposing conditions that are unreasonable or violate constitutional rights or statutory provisions. But such defects must be timely objected to in order to be raised on appeal.

Appellant did not object at trial to the imposition of the conditions. See fn.13, supra. The Court of Appeals erred in holding appellant could complain about the community supervision conditions for the first time on appeal. n11 The judgment of the Court of Appeals is reversed.

n11 In holding the probation conditions rendered the judgment void, the Court of Appeals also relied on *Gordon v. State*, 707 S.W.2d 626 (Tex. Crim. App. 1986), which held the trial court could not impose restitution relating to criminal conduct for which the defendant had been acquitted. *Speth*, 965 S.W.2d at 15. Gordon is inapplicable, however, as there was no question of procedural default presented in that case.

MEYERS, J.

Delivered December 1, 1999

CONCURBY: WOMACK

CONCUR: WOMACK, J., filed a concurring opinion, in which MCCORMICK, P.J., and KELLER and HOLLAND, JJ., joined.

In *State v. Ross, 953 S.W.2d 748 (Tex. Cr. App. 1997)*, the Court held that the meaning of "sentence" in Code of Criminal Procedure article 42.02 should be used in construing another statute which gives the State the right to appeal a "sentence [that] is illegal." n1 In a dissenting opinion, I gave my reasons for believing that "sentence" has different meanings in different contexts, and that it was a mistake to

use the article 42.02 meaning out of its context. See *953 S.W.2d at 752.* n2

n1 TEX. CODE CRIM. PROC. art. 44.01(b).

n2 In my Ross dissent I cited a number of statutes in which "sentence" cannot mean what it means in article 42.02. See *953 S.W.2d at 753.* Today the Court, ironically, quotes another statute that demonstrates the same point: TEX. CODE CRIM. PROC. art. 42.01. See ante, 1999 Tex. Crim. App. LEXIS 134, *6, n.4. When article 42.01 says, "The sentence served shall be based on the information contained in the judgment," "sentence" cannot have the meaning it has in article 42.02: "that part of the judgment ... that orders that the punishment be carried into execution in the manner prescribed by law." When a defendant is serving a sentence, he is not serving a part of a judgment; he is serving a punishment. In article 42.01, as in most contexts, "sentence" means "punishment," not "part of a judgment."

Today the Court uses the article 42.02 definition of "sentence" to decide, not what a statute means, but what our own judges meant when we held that a defect in a sentence could be raised for the first time on appeal. See *Heath v. State, 817 S.W.2d 335, 336 (Tex. Cr. App. 1991).* n3 Does our holding today mean that some appellants who have in the past been able to complain for the first time on appeal about void sentences, may no longer be able to do so if the error was not in the part of the judgment that article 42.02 defines as the "sentence"? For example, in *Heath v. State, supra,* we allowed an appeal from a revocation of probation to raise for the first time the trial court's authority to have granted probation to begin with. A question about that authority is

certainly not part of the article 42.02 "sentence," so I suppose it no longer may be raised for the first time on appeal.

n3 In this case the court below cited its earlier decision of *Martinez v. State,* 874 S.W.2d 267, 267 (Tex. App. -- Houston [14th Dist.] 1994), which in turn followed *Heath, supra.*

With all respect, I maintain that this is no way to decide what sort of issues may be raised for the first time on appeal.

Whether an error is, or is not, in the part of the judgment defined as a "sentence" in article 42.02 has nothing to do with the question. The relevant concerns include the policy behind requiring that objections be made in the trial court at the earliest opportunity. First, it is not judicially economical for appellate courts to correct errors years after the event when the trial court could have corrected the problem immediately if the offended party raised the problem when it arose. Second, there are social costs when sentences that have been imposed after the revocation of probation go unexecuted during the pendency of an appeal that is based on complaints about the conditions. Third, it is a natural expectation that a party with a bona fide complaint about a harmful error would raise the complaint as soon as the error was committed. Finally, injustice may result if a trial court makes decisions about sentencing with the reasonable understanding that a party has no objection to the decision, but the party is thereafter able to void some aspects of the punishment decision. (The colloquial term is "sandbagging the trial judge.") n4 Because of these policies, I agree that the court of appeals erred in holding that the appellant could raise these points for the first time on appeal. If the appellant thought

these conditions were unauthorized, he should have objected in the trial court.

> n4 "The generally acknowledged policies of requiring specific objections are two-fold. First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony." *Zillender v. State,* 557 S.W.2d 515 at 517 (Tex. Cr. App. 1977).

I also want to record my disagreement with the Court's continuing to describe probation as contractual, like a grant of clemency. See ante, 1999 Tex. Crim. App. LEXIS 134, *8-11. Executive clemency is contractual because it requires acceptance by the convicted person. Probation may be imposed on a defendant who does not wish it, see *Roberson v. State,* 852 S.W.2d 508, 512 (Tex. Cr. App. 1993), and it is therefore not contractual. A court (especially one that has imposed probation that was not requested) now has a number of alternatives to revocation for the recalcitrant probationer -- as the statute says, community supervision involves "a continuum of programs and sanctions." n5 These include "shock probation," n6 community-based programs, n7 community corrections facilities, n8 in-patient treatment for substance abuse, n9 house arrest by electronic monitoring, n10 confinement in jail, n11 confinement in a substance abuse treatment facility operated by the Department of Criminal Justice (which looks a lot like a prison), n12 and "any [other] reasonable condition that is designed to ... punish, rehabilitate, or reform the defendant." n13 It is the very ability of the trial court to put a defendant through such

a continuum that would make the defendant refuse to enter the contract, and inspire the court to impose probation.

n5 TEX. CODE CRIM. PROC. art. 42.12, § 2(2), quoted by the Court ante, 1999 Tex. Crim. App. LEXIS 134, *5, n.3.

n6 TEX. CODE CRIM. PROC. art. 42.12, §§ 6 & 7.

n7 Id., § 11(a)(10).

n8 Id., § 11(a)(12).

n9 Id., § 11(a)(15).

n10 Id., § 11(a)17.

n11 Id., § 12.

n12 Id., § 14.

n13 Id., § 11(a).

I concur in the judgment of the Court.

En banc.
Delivered December 1, 1999.

APPENDIX B

LAWRENCE EDWARD SPETH, Appellant v. THE STATE OF TEXAS,
Appellee

NO. 14-96-00946-CR

COURT OF APPEALS OF TEXAS,
FOURTEENTH DISTRICT, HOUSTON

965 S.W.2d 13; 1998 Tex. App. LEXIS 766

February 5, 1998, Opinion Filed

SUBSEQUENT HISTORY:

State's Petition for Discretionary Review Granted May 20, 1998.
PRIOR HISTORY: On Appeal from the 208th District Court. Harris County, Texas. Trial Court Cause No. 662182.

DISPOSITION: Affirmed as Reformed.

COUNSEL: Attorneys for Appellant: George M. Secrest, Jr., of Houston, TX.

Attorneys for Appellee: Carol Cameron of Houston, TX.

JUDGES: Panel consists of Justices Hudson, Fowler, and Draughn.*

* The Honorable Joe L. Draughn sitting by assignment.

OPINIONBY: Joe L. Draughn

OPINION:

This is an appeal from conditions of probation imposed by the trial court. Appellant, Lawrence Edward Speth ("Speth"), was adjudicated guilty of the offense of aggravated assault of a peace officer, see TEX. PENAL CODE ANN. § 22.02(b)(2) (Vernon 1994), and received a sentence of ten years probation, 180 days incarceration in the Harris County Jail, and a fine of $1,000. In five points of error, Speth challenges conditions imposed upon him as part of his probation. We affirm the trial court's imposition of one of the challenged conditions and reform the probationary order to delete the rest.

I. Background

Speth originally received five years deferred adjudication for his aggravated assault of a peace officer. Among the conditions imposed on Speth as part of the deferred adjudication was a requirement he not commit any further criminal offense. While still on deferred adjudication, Speth was indicted for the offense of indecency with a child. See TEX. PENAL CODE ANN. § 21.11 (Vernon 1994). In addition to the indictment, the State filed a motion to adjudicate guilt on the aggravated assault offense. n1

Although a jury found Speth not guilty of indecency with a child, the trial court found the State's allegations that Speth had committed such offense to be true, held the offense to be a violation of his deferred adjudication, and, therefore, proceeded to adjudicate Speth guilty of the aggravated assault of a peace officer offense.

> n1 Speth was also indicted on two charges of public lewdness involving two additional complainants. The charges arose from the same occasion giving rise to the indecency with a child charge and they were also listed in the State's motion to adjudicate guilt as grounds for granting the motion. The charges were dismissed, however, approximately two months before Speth's trial on the indecency with a child charge. The trial court subsequently decided to carry the motion to adjudicate guilt along with Speth's trial on the indecency with a child charge.

In granting probation on the aggravated assault conviction, the trial court imposed numerous conditions on Speth, including the following: (1) he register as a sex offender; (2) he pay for any counseling needed by the complainants involved in the indecency with a child charges; (3) he not be allowed to work as a chiropractor for the duration of his probation; (4) he participate in sex offender counseling and take a polygraph; and (5) he not have any contact with any minor girls for the duration of his probation. Speth challenges each of these conditions independently in his five points of error.

The State contests, as a preliminary matter, our authority to review Speth's points of error because he failed to object to the conditions in the trial court. See TEX. R. APP. P. 33. We

have recognized, however, that an "appellant is not barred from raising a defect in his sentence for the first time on appeal," see *Martinez v. State*, 874 S.W.2d 267, 267 (Tex. App.--Houston [14th Dist.] 1994, pet. ref'd), and we proceed to analyze the validity of the conditions of probation imposed by the trial court.

We review a trial court's imposition of probationary conditions under an abuse of discretion standard. See *LeBlanc v. State*, 908 S.W.2d 573, 574 (Tex. App.--Fort Worth 1995, no pet.). Section 11 of Article 42.12 of the Texas Code of Criminal Procedure permits a trial judge to "impose any reasonable condition . . . designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." TEX. CODE CRIM. PROC. ANN. *art. 42.12*) (noting a condition should have a "reasonable relationship to the treatment of the accused and the protection of the public"). Nevertheless, a trial court cannot impose conditions as punishment for criminal charges on which the defendant was acquitted. See *Gordon v. State*, 707 S.W.2d 626, 629-30 (Tex. Crim. App. 1986).

"When a trial court imposes an invalid condition of probation, the proper remedy is to reform the judgment by deleting the invalid condition." *Martinez v. State*, 874 S.W.2d at 268, (citing *Ex parte Pena*, 739 S.W.2d 50 (Tex. Crim. App. 1987)).

II. Discussion

In his first point of error, Speth argues the condition requiring him to register as a sex offender is invalid. Speth claims he is not required to register as a sex offender, under article 42.12, section 11(e), article 62.01, and article 62.02 of

the Texas Code of Criminal Procedure, n2 for the offense of aggravated assault of a peace officer, and, therefore, the condition is unreasonably imposed.

> n2 Articles 62.01 and 62.02 are part of a recent redesignation of article 6252-13c.1 of the Texas Revised Civil Statutes. See Act of June 13, 1997, 75th Leg., R.S., ch. 668, § 1, 1997 Tex. Gen. Laws 2253, 2253-2255.

We agree. First, we note there is no reasonable connection between a conviction for aggravated assault of a peace officer and the necessity for registration as a sex offender. See TEX. CODE CRIM. PROC. ANN. art. 62.01(5) (Vernon Supp. 1998). Second, we can only surmise that the condition Speth register as a sex offender was imposed as a means of punishment for the indecency with a child charge. Because Speth had been acquitted of that charge, however, the condition was an invalid attempt to circumvent the jury's verdict. See *Gordon v. State*, 707 S.W.2d at 629-30.

We sustain Speth's first point of error, and order the condition that Speth register as a sex offender be deleted from the list of his probationary conditions.

In his second point of error, Speth contends the condition that he pay for any counseling needed by the complaining witnesses is unauthorized by law, unreasonable, and is unenforceable due to overbroadness.

Article 42.12, section 11(b) of the Texas Code of Criminal Procedure specifically limits the trial judge's authority to order monetary payments,

[a] judge may not order a defendant to make any payments as a term or condition of community supervision, except for fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the defendant or otherwise expressly authorized by law. The court shall consider the ability of the defendant to make payments in ordering the defendant to make payments under this article.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(b). Section 14(b) of the same article sets out further conditions for monetary payments to be made by probationers convicted of "Child Abuse, Sex Offenders, and Family Violence Offenders,"

If the court grants probation to a person convicted of an offense under Section 21.11 [Indecency with a Child], 22.011 [Sexual Assault], 22.021 [Aggravated Sexual Assault], or 22.04 [Injury to a Child, Elderly Individual, or Disabled Individual], Penal Code, the court . . . may require the probationer to pay all or a part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense, upon a finding that the probationer is financially able to make payment. Any payments ordered under this subsection may not extend past one year from the date of the order.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 14(b).

We hold that the trial court's imposition of the condition requiring Speth to pay for "any counseling or therapy" needed by the complaining witnesses in the indecency with a child action is unreasonable under both of the aforementioned provisions. In imposing the condition, the trial court failed to

meet the requisites of both sections 11(b) and 14(b) of the Texas Code of Criminal Procedure because it did not consider and make a finding as to Speth's ability to pay for the counseling. The condition was also not limited to one year as required by section 14(b).

Moreover, the condition was clearly imposed by the trial court as punishment for the indecency with a child offense, a charge from which Speth had been acquitted. The trial court is not permitted to circumvent the jury's verdict in such a manner. See *Gordon v. State*, 707 S.W.2d at 629-30.

We sustain Speth's second point of error and reform the probationary order to delete the requirement that he pay for any and all counseling required by the complaining witnesses from his conditions of probations.

In his third point of error, Speth contends the condition requiring him to participate in sex offender counseling and take a polygraph exam as part of that counseling is unreasonable.

Speth admits he stated during the punishment hearing that he would be willing to attend psychological counseling, but asserts "the choice to reject probation and go to prison or accept the probationary choice was really no choice at all." See *Tamez v. State*, 534 S.W.2d 686, 692. Instead of being confronted by the trial court with the Hobson's choice of probation over prison, however, Speth himself originated the idea of sex offender counseling as a means of gaining probation. Under the doctrine of invited error, we hold Speth "cannot invite error and then complain thereof." See *Capistran v. State*, 759 S.W.2d 121, 124-25 (Tex. Crim. App.

1982), (quoting *Holmes v. State*, 140 Tex. Crim. 619, 146 S.W.2d 400 (1941).

The trial court's requirement that Speth take and pay for a polygraph examination is unreasonable, however. Speth did not first raise the issue of a polygraph as an appropriate condition of probation, and the trial court imposed the condition as punishment for the indecency with a child charge. The requirement is, thus, invalid as punishment for a charge to which Speth was acquitted. See *Gordon v. State*, 707 S.W.2d at 629-30.

In his fourth point of error, Speth contends the condition forbidding him from working as a chiropractor is unreasonable.

The condition restricting Speth from pursuing his chosen profession is clearly unreasonable in the sense that it has no relationship to his crime of aggravated assault of a peace officer and it prohibits him from conduct which is not criminal in itself. See *LeBlanc v. State*, 908 S.W.2d at 574-75. The State argues, however, the condition is reasonably related to the protection of the public and addresses the potential future criminality of Speth. n3 See *Lacy v. State*, 875 S.W.2d 3, 5 (Tex. App.--Tyler 1994, pet. ref'd). The State asserts Speth's repeated improper touching of persons requires a condition preventing his performance of the duties of a chiropractor because those duties necessarily require the touching of patients.

n3 The State also argues the condition is moot because Speth admitted during the punishment hearing that the conviction for aggravated assault of a peace officer precludes him from becoming a licensed chiropractor.

> While the assertion Speth is already disqualified from practicing as a chiropractor may or may not be true, this fact does not address whether the trial court may impose, upon a basis of reasonableness, a probationary condition prohibiting him from practicing in his chosen career. Therefore, we find the State's argument unpersuasive as to the issue before us.

We disagree. We do not believe Speth's aggravated assault of a peace officer shows a proclivity for improper touching of individuals such that the trial court can completely bar him from practicing his chosen career. The trial court's blanket restraint on Speth's practice as a chiropractor is, thus, unreasonable in relation to his crime. Moreover, we do not believe the charge of indecency with a child can be used to show Speth's repeated improper touching of persons because he was specifically acquitted of the charge. See *Gordon v. State*, 707 S.W.2d at 629-30; Cf. *Horner v. Reed*, 756 S.W.2d 34, 36-37 (Tex. App.--San Antonio 1988, orig. proceeding) (holding unreasonable a condition requiring relator to resign his elected office where there had been no finding of guilt).

In his fifth point of error, Speth contends the condition that he have no contact with any minor girls for the duration of his probation is not authorized, as well as overbroad, ambiguous and unenforceable.

We agree. Again, we note the condition has no relation whatsoever to Speth's conviction for an aggravated assault of a peace officer, and the condition thus represents an impermissible requirement, which, if permitted, would effectively circumvent the jury's not-guilty verdict in the

indecency with a child action. See *Gordon v. State,* 707 S.W.2d at 629-30.

Furthermore, even if the condition could be said to be related to an offense for which Speth had been convicted, the condition would remain unreasonable due to its indefiniteness. "The conditions of probation should be clear, explicit, and unambiguous, so that the probationer understands what is expected of him." *Johnson v. State,* 672 S.W.2d 621, 623 (Tex. App.--Corpus Christi 1984, no pet.). "Contact" is defined to mean several things: the physical union of surfaces; a simple association, whether verbal or not, with another person; or the establishment of communication with another. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 282 (private library ed. 1991). Based on the varying definitions of contact, Speth, in the extreme, could be prohibited from walking down the street in Houston and saying "hello" to any female n4 or simply from establishing physical contact, handshake or otherwise, with a minor female. We hold the condition is unreasonable because it fails to give Speth notice of what is expected of him. Compare *Pequeno v. State,* 710 S.W.2d 709, 710 (Tex. App.--Houston [1st Dist.] 1986, pet. ref'd) (holding a condition prohibiting probationer from having any contact whatsoever with complainant, "whether in person, by telephone, or by writing," was reasonable).

n4 This hypothetical points out another complication of the trial court's condition--the probationary imposition of apparent strict liability on Speth for "contact" with a minor female, notwithstanding the fact that Speth may have no knowledge as to her age. While the law may recognize such liability in the event of an egregious type of contact, see, e.g., TEX. PENAL CODE ANN. § 22.011(a)(2)

(Vernon Supp. 1998) (sexual assault), we believe the lack of a required element of knowledge, in conjunction with the indefiniteness in the term "contact," could result in an undue restriction on Speth's daily life. See *Tamez v. State,* 534 S.W.2d at 692.

We sustain Speth's fifth point of error, and reform the probationary order to delete the condition prohibiting him from having contact with any minor girls from the list of probationary conditions imposed by the trial court.

The judgment of the trial court is reformed to delete all of the challenged conditions of probation, except the condition that Speth attend psychological counseling. Speth's conviction remains valid, and his probation continues subject to the remaining valid conditions and any other valid conditions the trial court, in its continuing jurisdiction, deems necessary to impose. See TEX. CODE CRIM. PROC. ANN. *art. 42.12, § 11(a)* (Vernon Supp. 1998); *Coleman v. State,* 640 S.W.2d 889, 892 (Tex. Crim. App. 1982).

/s/ Joe L. Draughn
Justice
Judgment rendered and Opinion filed February 5, 1998.

Panel consists of Justices Hudson, Fowler, and Draughn. n5
n5 The Honorable Joe L. Draughn sitting by assignment.

APPENDIX C

ORIGINAL RECEIVED IN
KATHERINE TYRA, DISTRICT
CLERK'S OFFICE
APR 11 1996
DATE
DEPUTY

NO. 662182

STATE OF TEXAS § IN THE

VS. § 14TH

LAWRENCE SPETH § COURT OF APPEALS

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES LAWRENCE SPETH, Defendant in the above-styled and numbered cause, and files this Motion for New Trial, pursuant to Rule 30 of the Texas Rules of Appellate Procedure, and in support thereof shows the following:

1. Sentence was imposed on March 22, 1996. This motion for new trial is therefore due before April 21, 1996.

II.

A. The Court committed a material error calculated to injure the tights of the accused. The Court adjudicated Defendant on the Motion to Adjudicate (First Amended) despite the fact that a jury of twelve men and women acquitted Defendant of the exact same conduct that was tried in the case in chief Defendant has been denied due process of law, equal protection of the law, is barred from being adjudicated for the same conduct as was the basis of the trial on the basis of res judicata, judicial estoppel and double jeopardy,

B. The verdict and finding of true on the allegations of the Motion to Adjudicate was Contrary to the law evidence.

C. The Court committed a material error calculated to injure the rights of the accused. The continuation and modification of Defendant's Community

Supervision exceeds the authority of Article 42.12, Section 22, as follows:

1. The total period of community supervision cannot exceed ten (10) years. The Court erroneously ordered an additional ten (10) years of community Supervision.
2. The Court cannot order a polygraph examination
3. The Court cannot order sex therapy.
4. The Court cannot order Defendant not to be a Chiropractor.
5. The Court cannot order the Defendant not to be with females under the age of eighteen (18) years.
6. The Court cannot order the Defendant into a sex offender program

7. The Court cannot order the Defendant to report as a sex offender.

8. The Court cannot order the Defendant be identified as a sex offender.

III.

The trial court has committed an error material to the defense and injurious to the. rights of the Defendant to wit: A Motion for Directed verdict based upon the insufficiency of the evidence was overruled by the court.

IV.

The verdict is contrary to the law and evidence in the -case, to wit: There is a fatal variance between the Motion to Adjudicate (First Amended) and the proof in flat the in Motion charges the Defendant with a violation of the term and conditions of his Deferred Adjudication for "Aggravated Assault of a Police Officer", and the evidence proves that the Defendant was placed on Deferred Adjudication for

"Aggravated Assault" only, which status is a bar to prosecution and Adjudication of the Defendant.

V.

The verdict is contrary to the law and evidence in the case, to wit: there was no evidence or insufficient evidence to support an adjudication of the Defendant by a preponderance of the evidence.

VI.

The court erred when it denied Defendant's Motion for Directed Verdict of Acquittal/Finding of NOT True where the basis of the criminal charge filed against the Defendant and the Motion to Adjudicate (First Amended) concerned the exact same conduct that was tried in the case in chief and that a jury of twelve men and women acquitted Defendant of Defendant asserts that Article 42.12 of the Texas Code of Criminal Procedure is unconstitutional. and violative of the Due Process Clause and the Equal Protection Clause of the

Constitution of the United States of America, as well as the Constitution of the State of Texas. Specifically, Defendant asserts that Article 42.12 of the Texas Code of Criminal Procedure allows a person, including the Defendant, to be tried and convicted of a criminal offense by a mere "preponderance of the evidence" rather than the constitutionally required "beyond a reasonable doubt". The application of the "by a preponderance of the evidence' standard renders Article 42.12 impermissibly vague and indefinite. Defendant asserts that due process and equal protection under the law require that the Defendant be tried by a jury, as was demanded, and if convicted, the evidence of the conviction would allow the court to adjudicate him upon finding the conviction to be legally valid by a preponderance of the evidence. Allowing the court to try theDefendant by a mere preponderance of the evidence allows the court to "convict" by an impermissibly lower evidentiary standard

than is mandated by our Constitutions To take away the liberty guaranteed to the Defendant under such circumstance, especially when a jury acquitted him, violates Defendant's constitutional rights.

VII.

The court erred when it overruled Defendant's Objections to the hearing and/or the continuation of the hearing on the Motion to Adjudicate (First Amended) where the basis of the criminal charge filed against the Defendant and. the Motion to Adjudicate (First Amended) concerned the exact same conduct that was tried in the case in. chief and that a jury of twelve men and women acquitted Defendant of Defendant asserts that Article 42.12 of the Tom Code of Criminal Procedure is unconstitutional and violative of the Due Process Clause and the Equal Protection Clause of the Constitution of the United States of America, as well as the Constitution of the State of Texas Specifically, Defendant

alleges that Article 42.12 of the Texas Code of Criminal Procedure allows a person, including the Defendant, to be tried and convicted of a criminal offense by a mere "preponderance of the evidence" rather than the constitutionally required "beyond a reasonable doubt". The application of the "by a preponderance of the evidence" standard renders Article 42.12 impermissibly vague and indefinite. Defendant asserts that due process and equal protection under the law require that the Defendant be tried by a jury, as was demanded, and if convicted, the evidence of the conviction would allow the court to adjudicate him upon finding the conviction to be legally valid by a preponderance of the evidence. Allowing the court to try the Defendant by a mere preponderance of the evidence allows the court to "convict" by an impermissibly lower evidentiary standard than is mandated by our Constitutions. To take away the liberty guaranteed to the Defendant under such circumstance

especially when a jury acquitted him, violates Defendant's constitutional rights.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grant his Motion for New Trial and enter a judgment of not true. Alternatively, Defendant prays that this Court grant his Motion For New Trial. Alternatively, Defendant prays that the Court modify its Orders to comply with the law and grant a new trial.

Respectfully submitted,

Law Offices of Allan A. Cease
3350 Highway 6, Suite 565
Sugar Land, Texas 77478
(713) 988-9980
Fax: (713) 265-0642

BY: s/
Allan A. Cease
STATE BAR NO.: 04040550
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion For Now Trial was hand delivered, to the Attorneys Office, at 201 San Jacinto, Houston, Texas 77002, on April 11,1996.

BY:s/_____
Allan A . Cease

ATTORNEY FOR DEFENDANT

CERTIFICATE OF PRESENTATION

I certify that I am counsel for defendant in this can and that I presented this motion to the Court on April 11, 1996, within 10 days after filing it.

/s/ _____
Allan A. Cease

ORDER SETTING HEARING DATE

IT IS ORDERED that the hearing on this motion For New Trial, having been presented to the trial court within 10 days after its filing, is hereby set for _____1996, at ____ o'clock in the courtroom of the 208th Judicial District Court of Harris County, Texas.

_____
JUDGE PRESIDING

NO. 662182 & 707937

STATE OF TEXAS	**§**	**IN THE**
VS.	**§**	**14TH**
LAWRENCE SPETH	**§**	**C O U R T O F APPEALS**

FIAT

On _____, 1996, came on to be considered the Motion For New Trial, and said matter is hereby set for hearing on _____,1996, at __ o'clock, in the 208th Judicial District Court of Harris County, Texas,

SIGNED on the date set forth above.

_____
JUDGE PRESIDING

ORDER FOR NEW TRIAL

On this the __ day of _____ came on to be board Defendant's Motion For New Trial, and it is hereby

(GRANTED) (DENIED).

_____
JUDGE PRESIDING

STATE OF TEXAS §
§
COUNTY OF FORT BEND §

AFFIDAVIT

BEFORE ME, the undersigned Authority, On this day personally appeared Allan A. Cease, who after being duly sworn stated:

> "I am the attorney for the defendant in the above entitled and numbered cause. I have read the foregoing Motion for New Trial and swear that all of the allegations of fact contained therein are true and correct."

s/
Allan A. Cease, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on which witness my hand and seal of office.

s/
Notary Public, State of Texas

APPENDIX D

Art. 42.12, Tex. Code of Crim. Proc. Community supervision

Purpose

Sec. 1. It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is the purpose of this article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of community supervision in the public interest.

Definitions

Sec. 2. In this article:

(1) "Court" means a court of record having original criminal jurisdiction.

(2) "Community supervision" means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which:

(A) criminal proceedings are deferred without an adjudication of guilt; or

(B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

(3) "Supervision officer" means a person appointed or employed under Section 76.004, Government Code, to supervise defendants placed on community supervision.

(4) "Electronic monitoring" includes voice tracking systems, position tracking systems, position location systems, biometric tracking systems, and any other electronic or telecommunications system that may be used to assist in the supervision of individuals under this article.

Judge Ordered Community Supervision

Sec. 3. (a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere, may suspend the imposition of the sentence and place the defendant on community supervision or impose a fine applicable to the offense and place the defendant on community supervision.

(b) Except as provided by Subsection (f), in a felony case the minimum period of community supervision is the same as the minimum term of imprisonment applicable to the offense and the maximum period of community supervision is 10 years.

(c) The maximum period of community supervision in a misdemeanor case is two years.

(d) A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) or 22A of this article.

(e) A defendant is not eligible for community supervision under this section if the defendant:

(1) is sentenced to a term of imprisonment that exceeds 10 years; or

(2) is sentenced to serve a term of confinement under Section 12.35, Penal Code.

(f) The minimum period of community supervision for a felony described by Section 13B(b) is five years and the maximum period of supervision is 10 years.

(g) A judge shall not deny community supervision to a defendant based solely on the defendant's inability to speak, read, write, hear, or understand English.

Secs. 3a to 3f. [Blank]

Limitation on Judge Ordered Community Supervision

Sec. 3g. (a) The provisions of Section 3 of this article do not apply:

(1) to a defendant adjudged guilty of an offense under:

(A) Section 19.02, Penal Code (Murder);

(B) Section 19.03, Penal Code (Capital murder);

(C) Section 21.11(a)(1), Penal Code (Indecency with a child);

(D) Section 20.04, Penal Code (Aggravated kidnapping);

(E) Section 22.021, Penal Code (Aggravated sexual assault);

(F) Section 29.03, Penal Code (Aggravated robbery);

(G) Chapter 481, Health and Safety Code, for which punishment is increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any of those subsections; or

(H) Section 22.011(a)(2), Penal Code (Sexual assault); or

(2) to a defendant when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in its judgment.

(b) If there is an affirmative finding under Subsection (a)(2) in the trial of a felony of the second degree or higher that the deadly weapon used or exhibited was a firearm and the defendant is granted community supervision, the court

may order the defendant confined in the institutional division of the Texas Department of Criminal Justice for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the institutional division, the sentencing judge, on his own motion or on motion of the defendant, may order the defendant released to community supervision. The institutional division shall release the defendant to community supervision after he has served 120 days.

. . . .

Deferred Adjudication; Community Supervision

Sec. 5. (a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision. A judge may place on community supervision under this section a defendant charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a defendant charged with a felony described by Section 13B(b) of this article, only if the judge makes a finding in open court that placing the defendant on community supervision is in the best interest of the victim. The failure of the judge to find that deferred adjudication is in the best interest of the victim is not grounds for the defendant to set aside the plea, deferred adjudication, or any subsequent conviction or sentence. After placing the defendant on community supervision under this section, the judge shall inform the defendant orally or in writing of the

possible consequences under Subsection (b) of this section of a violation of community supervision. If the information is provided orally, the judge must record and maintain the judge's statement to the defendant. The failure of a judge to inform a defendant of possible consequences under Subsection (b) of this section is not a ground for reversal unless the defendant shows that he was harmed by the failure of the judge to provide the information. In a felony case, the period of community supervision may not exceed 10 years. For a defendant charged with a felony under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, and for a defendant charged with a felony described by Section 13B(b) of this article, the period of community supervision may not be less than five years. In a misdemeanor case, the period of community supervision may not exceed two years. A judge may increase the maximum period of community supervision in the manner provided by Section 22(c) or 22A of this article. The judge may impose a fine applicable to the offense and require any reasonable conditions of community supervision, including mental health treatment under Section 11(d) of this article, that a judge could impose on a defendant placed on community supervision for a conviction that was probated and suspended, including confinement. The provisions of Section 15 of this article specifying whether a defendant convicted of a state jail felony is to be confined in a county jail or state jail felony facility and establishing the minimum and maximum terms of confinement as a condition of community supervision apply in the same manner to a defendant placed on community supervision after pleading guilty or nolo contendere to a state jail felony. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the judge shall proceed to final adjudication as in all other cases.

(b) On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of this article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred. A court assessing punishment after an adjudication of guilt of a defendant charged with a state jail felony may suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed, regardless of whether the defendant has previously been convicted of a felony.

(c) On expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him. The judge may dismiss the proceedings and discharge a defendant, other than a defendant charged with an offense described by Section 13B(b) of this article, prior to the expiration of the term of community supervision if in the judge's opinion the best interest of society and the defendant will be served. The judge may dismiss the proceedings and discharge a defendant charged with a felony described by Section 13B(b) of this article only if in the judge's opinion the best interest of society and the defendant will be served and the defendant has successfully completed at least two-thirds of the period of community supervision. Except as provided

by Section 12.42(g), Penal Code, a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense. For any defendant who receives a dismissal and discharge under this section:

(1) upon conviction of a subsequent offense, the fact that the defendant had previously received community supervision with a deferred adjudication of guilt shall be admissible before the court or jury to be considered on the issue of penalty;

(2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant previously has received community supervision with a deferred adjudication of guilt under this section in issuing, renewing, denying, or revoking a license under that chapter; and

(3) if the defendant is a person who has applied for registration to provide mental health or medical services for the rehabilitation of sex offenders, the Interagency Council on Sex Offender Treatment may consider the fact that the defendant has received community supervision under this section in issuing, renewing, denying, or revoking a license or registration issued by that council.

(d) In all other cases the judge may grant deferred adjudication unless:

(1) the defendant is charged with an offense:

(A) under Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or

(B) for which punishment may be increased under Section 481.134(c), (d), (e), or (f), Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any one of those subsections; or

(2) the defendant:

(A) is charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a felony described by Section 13B(b) of this article; and

(B) has previously been placed on community supervision for any offense under Paragraph (A) of this subdivision.

Continuing Court Jurisdiction in Felony Cases

Sec. 6. (a) For the purposes of this section, the jurisdiction of a court in which a sentence requiring imprisonment in the institutional division of the Texas Department of Criminal Justice is imposed by the judge of the court shall continue for 180 days from the date the execution of the sentence actually begins. Before the expiration of 180 days from the date the execution of the sentence actually begins, the judge of the court that imposed such sentence may on his own motion, on the motion of the attorney representing the state, or on the written motion of the defendant, suspend further execution of the sentence and place the defendant on community supervision under the terms and conditions of this article, if

in the opinion of the judge the defendant would not benefit from further imprisonment and:

(1) the defendant is otherwise eligible for community supervision under this article; and

(2) the defendant had never before been incarcerated in a penitentiary serving a sentence for a felony.

(b) When the defendant or the attorney representing the state files a written motion requesting suspension by the judge of further execution of the sentence and placement of the defendant on community supervision, and when requested to do so by the judge, the clerk of the court shall request a copy of the defendant's record while imprisoned from the institutional division of the Texas Department of Criminal Justice or, if the defendant is confined in county jail, from the sheriff. Upon receipt of such request, the institutional division of the Texas Department of Criminal Justice or the sheriff shall forward to the judge, as soon as possible, a full and complete copy of the defendant's record while imprisoned or confined. When the defendant files a written motion requesting suspension of further execution of the sentence and placement on community supervision, he shall immediately deliver or cause to be delivered a true and correct copy of the motion to the office of the attorney representing the state.

(c) The judge may deny the motion without a hearing but may not grant the motion without holding a hearing and providing the attorney representing the state and the defendant the opportunity to present evidence on the motion.

Sec. 8. . . .

(m) In this section, "sex offender" means a person who has been convicted or has entered a plea of guilty or nolo contendere for an offense under any one of the following provisions of the Penal Code:

(1) Section 20.04(a)(4) (Aggravated Kidnapping), if the person committed the offense with the intent to violate or abuse the victim sexually;

(2) Section 21.08 (Indecent Exposure);

(3) Section 21.11 (Indecency with a Child);

(4) Section 22.011 (Sexual Assault);

(5) Section 22.021 (Aggravated Sexual Assault);

(6) Section 25.02 (Prohibited Sexual Conduct);

(7) Section 30.02 (Burglary), if:

(A) the offense is punishable under Subsection (d) of that section; and

(B) the person committed the offense with the intent to commit a felony listed in this subsection;

(8) Section 43.25 (Sexual Performance by a Child); or

(9) Section 43.26 (Possession or Promotion of Child Pornography).

Authority to Impose, Modify, or Revoke Community Supervision

Sec. 10. (a) Only the court in which the defendant was tried may grant community supervision, impose conditions, revoke the community supervision, or discharge the defendant, unless the judge has transferred jurisdiction of the case to another court with the latter's consent. Except as provided by Subsection (d) of this section, only the judge may alter conditions of community supervision. In a felony case, only the judge who originally sentenced the defendant may suspend execution thereof and place the defendant under community supervision pursuant to Section 6 of this article. If the judge who originally sentenced the defendant is deceased or disabled or if the office is vacant and the judge who originally sentenced the defendant is deceased or disabled or if the office is vacant and a motion is filed in accordance with Section 6 of this article, the clerk of the court shall promptly forward a copy of the motion to the presiding judge of the administrative judicial district for that court, who may deny the motion without a hearing or appoint a judge to hold a hearing on the motion.

(b) After a defendant has been placed on community supervision, jurisdiction of the case may be transferred to a court of the same rank in this state having geographical jurisdiction where the defendant is residing or where a violation of the conditions of community supervision occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court.

(c) Any judge of a court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of community supervision occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the judge of the court having jurisdiction of the case at the time the action is taken.

(d) A judge that places a defendant on community supervision may authorize the supervision officer supervising the defendant or a magistrate appointed by the district courts in the county that give preference to criminal cases to modify the conditions of community supervision for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions.

(e) If a supervision officer or magistrate modifies the conditions of community supervision, the officer or magistrate shall deliver a copy of the modified conditions to the defendant, shall file a copy of the modified conditions with the sentencing court, and shall note the date of delivery of the copy in the defendant's file. If the defendant agrees to the modification in writing, the officer or magistrate shall file a copy of the modified conditions with the district clerk and the conditions shall be enforced as modified. If the defendant does not agree to the modification in writing, the supervision officer or magistrate shall refer the case to the judge of the court for modification in the manner provided by Section 22 of this article.

(j-3) Deleted by Acts 1993, 73rd Leg., ch. 900, § 4.01, eff. Sept. 1, 1993.

Basic Conditions of Community Supervision

Sec. 11. (a) The judge of the court having jurisdiction of the case shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. Conditions of community supervision may include, but shall not be limited to, the conditions that the defendant shall:

(1) Commit no offense against the laws of this State or of any other State or of the United States;

(2) Avoid injurious or vicious habits;

(3) Avoid persons or places of disreputable or harmful character;

(4) Report to the supervision officer as directed by the judge or supervision officer and obey all rules and regulations of the community supervision and corrections department;

(5) Permit the supervision officer to visit him at his home or elsewhere;

(6) Work faithfully at suitable employment as far as possible;

(7) Remain within a specified place;

(8) Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums;

(9) Support his dependents;

(10) Participate, for a time specified by the judge in any community-based program, including a community-service work program under Section 16 of this article;

(11) Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case, if counsel was appointed, or if he was represented by a county-paid public defender, in an amount that would have been paid to an appointed attorney had the county not had a public defender;

(12) Remain under custodial supervision in a community corrections facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

(13) Pay a percentage of his income to his dependents for their support while under custodial supervision in a community corrections facility;

(14) Submit to testing for alcohol or controlled substances;

(15) Attend counseling sessions for substance abusers or participate in substance abuse treatment services in a program or facility approved or licensed by the Texas Commission on Alcohol and Drug Abuse;

(16) With the consent of the victim of a misdemeanor offense or of any offense under Title 7, Penal Code, participate in victim-defendant mediation;

(17) Submit to electronic monitoring;

(18) Reimburse the general revenue fund for any amounts paid from that fund to a victim, as defined by Article 56.01 of this code, of the defendant's offense or if no reimbursement is required, make one payment to the fund in an amount not to exceed $50 if the offense is a misdemeanor or not to exceed $100 if the offense is a felony;

(19) Reimburse a law enforcement agency for the analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense;

(20) Pay all or part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense or for counseling and education relating to acquired immune deficiency syndrome or human immunodeficiency virus made necessary by the offense;

(21) Make one payment in an amount not to exceed $50 to a crime stoppers organization as defined by Section 414.001, Government Code, and as certified by the Crime Stoppers Advisory Council; and

(22) Submit a blood sample or other specimen to the Department of Public Safety under Subchapter G, Chapter 411, Government Code, for the purpose of creating a DNA record of the defendant.

(b) A judge may not order a defendant to make any payments as a term or condition of community supervision, except for fines, court costs, restitution to the victim, and other conditions related personally to the rehabilitation of the

defendant or otherwise expressly authorized by law. The court shall consider the ability of the defendant to make payments in ordering the defendant to make payments under this article.

(c) If the judge or jury places a defendant on community supervision, the judge shall require the defendant to demonstrate to the court whether the defendant has an educational skill level that is equal to or greater than the average skill level of students who have completed the sixth grade in public schools in this state. If the judge determines that the defendant has not attained that skill level, the judge shall require as a condition of community supervision that the defendant attain that level of educational skill, unless the judge determines that the defendant lacks the intellectual capacity or the learning ability to ever achieve that level of skill.

(d) If the judge places a defendant on community supervision and the defendant is determined to have a mental illness or be a person with mental retardation by an examining expert under Article 16.22 or Section 3, Article 46.02, of this code or in a psychological evaluation conducted under Section 9(i) of this article, the judge may require the defendant as a condition of community supervision to submit to outpatient or inpatient mental health or mental retardation treatment if the:

(1) defendant's:

(A) mental impairment is chronic in nature; or

(B) ability to function independently will continue to deteriorate if the defendant does not receive mental health or mental retardation services; and

(2) judge determines, in consultation with a local mental health or mental retardation services provider, that appropriate mental health or mental retardation services for the defendant are available through the Texas Department of Mental Health and Mental Retardation under Section 534.053, Health and Safety Code, or through another mental health or mental retardation services provider.

(e) A judge granting community supervision to a defendant required to register as a sex offender under Chapter 62 shall require the registration as a condition of community supervision.

(f) A judge may not require a defendant to undergo an orchiectomy as a condition of community supervision.

(g) to (k) [Blank].

(l)(1) If the court grants community supervision to a person convicted of an offense under Section 42.072, Penal Code, the court may require as a condition of community supervision that the person may not:

(A) communicate directly or indirectly with the victim; or

(B) go to or near the residence, place of employment, or business of the victim or to or near a school, day-care facility, or similar facility where a dependent child of the victim is in attendance.

(2) If the court requires the prohibition contained in Subdivision (1)(B) of this subsection as a condition of community supervision, the court shall specifically describe the prohibited locations and the minimum distances, if any, that the person must maintain from the locations.

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Children

Sec. 13B. (a) If a judge grants community supervision to a defendant described by Subsection (b) and the judge determines that a child as defined by Section 22.011(c), Penal Code, was the victim of the offense, the judge shall establish a child safety zone applicable to the defendant by requiring as a condition of community supervision that the defendant:

(1) not:

(A) supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; or

(B) go in, on, or within a distance specified by the judge of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility; and

(2) attend psychological counseling sessions for sex offenders with an individual or organization which provides sex offender treatment or counseling as specified by or approved by the judge or the community supervision and corrections department officer supervising the defendant.

(b) This section applies to a defendant placed on community supervision for an offense:

(1) under Section 43.25 or 43.26, Penal Code;

(2) under Section 21.08, 21.11, 22.011, 22.021, or 25.02, Penal Code;

(3) under Section 20.04(a)(4), Penal Code, if the defendant committed the offense with the intent to violate or abuse the victim sexually; or

(4) under Section 30.02, Penal Code, punishable under Subsection (d) of that section, if the defendant committed the offense with the intent to commit a felony listed in Subdivision (2) or (3) of this subsection.

(c) A community supervision and corrections department officer who under Subsection (a)(2) specifies a sex offender treatment provider to provide counseling to a defendant shall contact the provider before the defendant is released, establish the date, time, and place of the first session between the defendant and the provider, and request the provider to immediately notify the officer if the defendant fails to attend the first session or any subsequent scheduled session.

(d) Notwithstanding Subsection (a)(1), a judge is not required to impose the conditions described by Subsection (a)(1) if the defendant is a student at a primary or secondary school.

(e) At any time after the imposition of a condition under Subsection (a)(1), the defendant may request the court to

modify the child safety zone applicable to the defendant because the zone as created by the court:

(1) interferes with the ability of the defendant to attend school or hold a job and consequently constitutes an undue hardship for the defendant; or

(2) is broader than is necessary to protect the public, given the nature and circumstances of the offense.

(f) A community supervision and corrections department officer supervising a defendant described by Subsection (b) may permit the defendant to enter on an event-by-event basis into the child safety zone from which the defendant is otherwise prohibited from entering if:

(1) the defendant has served at least two years of the period of community supervision;

(2) the defendant enters the zone as part of a program to reunite with the defendant's family;

(3) the defendant presents to the officer a written proposal specifying where the defendant intends to go within the zone, why and with whom the defendant is going, and how the defendant intends to cope with any stressful situations that occur;

(4) the sex offender treatment provider treating the defendant agrees with the officer that the defendant should be allowed to attend the event; and

(5) the officer and the treatment provider agree on a chaperon to accompany the defendant and the chaperon agrees to perform that duty.

(g) Section 10(a) does not prohibit a community supervision and corrections department officer from altering a condition of community supervision by permitting a defendant to enter a child safety zone under Subsection (f).

(h) In this section, "playground," "premises," "school," "video arcade facility," and "youth center" have the meanings assigned by Section 481.134, Health and Safety Code.

Community Supervision for Making a Firearm Accessible to a Child

Sec. 13C. (a) A court granting community supervision to a defendant convicted of an offense under Section 46.13, Penal Code, may require as a condition of community supervision that the defendant:

(1) provide an appropriate public service activity designated by the court; or

(2) attend a firearms safety course which meets or exceeds the requirements set by the National Rifle Association as of January 1, 1995, for a firearms safety course that requires not more than 17 hours of instruction.

(b) The court shall require the defendant to pay the cost of attending the firearms safety course under Subsection (a)(2).

Child Abusers, Sex Offenders, and Family Violence Offenders; Special

Conditions

Sec. 14. (a) If the court grants probation to a person convicted of an offense described by Article 17.41(a) of this code, the court may require as a condition of probation that the defendant not directly communicate with the victim of the offense or go near a residence, school, or other location, as specifically described in the copy of terms and conditions, frequented by the victim. In imposing the condition, the court may grant the defendant supervised access to the victim. To the extent that a condition imposed under this subsection conflicts with an existing court order granting possession of or access to a child, the condition imposed under this subsection prevails for a period specified by the court granting probation, not to exceed 90 days.

(b) If the court grants probation to a person convicted of an offense under Section 21.11, 22.011, 22.021, or 22.04, Penal Code, the court may require the probationer to attend psychological counseling sessions at the direction of the probation officer and may require the probationer to pay all or a part of the reasonable and necessary costs incurred by the victim for psychological counseling made necessary by the offense, upon a finding that the probationer is financially able to make payment. Any payments ordered under this subsection may not extend past one year from the date of the order.

(c) If the court grants probation to a person convicted of an offense involving family violence, as defined by Section 71.01, Family Code, the court may require the probationer to attend, at the direction of the probation officer, counseling sessions for the elimination of violent behavior with a licensed counselor, social worker, or other professional who

has been trained in family violence intervention or to attend a battering intervention and prevention program. If the court requires the probationer to attend counseling or a program, the court shall require the probationer to begin attendance not later than the 60th day after the date the court grants probation, notify the probation officer of the name, address, and phone number of the counselor or program, and report the probationer's attendance to the probation officer. The court shall require the probationer to pay all the reasonable costs of the counseling sessions or attendance in the program on a finding that the probationer is financially able to make payment. If the court finds the probationer is unable to make payment, the court shall make the counseling sessions or enrollment in the program available without cost to the probationer. The court may also require the probationer to pay all or a part of the reasonable costs incurred by the victim for counseling made necessary by the offense, on a finding that the probationer is financially able to make payment. The court may order the probationer to make payments under this subsection for a period not to exceed one year after the date on which the order is entered.

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Fees

Sec. 19. (a) Except as otherwise provided by this subsection, a judge granting community supervision shall fix a fee of not less than $25 and not more than $40 per month to be paid to the court by the defendant during the community supervision period. The judge may make payment of the fee a condition of granting or continuing the community supervision. The judge may waive or reduce the fee or

suspend a monthly payment of the fee if the judge determines that payment of the fee would cause the defendant a significant financial hardship.

(b) The judge shall deposit the fees received under Subsection (a) of this section in the special fund of the county treasury, to be used for the same purposes for which state aid may be used under Chapter 76, Government Code.

(c) A judge receiving a defendant for supervision as authorized by Article 42.11 of this code may impose on the defendant any term of community supervision authorized by this article and may require the defendant to pay the fee authorized by Subsection (a) of this section. Fees received under this section shall be deposited in the same manner as required by Subsection (b) of this section.

(d) For the purpose of determining when fees due on conviction are to be paid to any officer or officers, the placing of the defendant on community supervision shall be considered a final disposition of the case, without the necessity of waiting for the termination of the period of community supervision.

(e) If the judge grants community supervision to a defendant convicted of an offense under Section 21.08, 21.11, 22.011, 22.021, 25.02, 43.25, or 43.26, Penal Code, the judge shall require as a condition of community supervision that the defendant pay to the community corrections and supervision department officer supervising the defendant a community supervision fee of $5 each month during the period of community supervision. The fee is in addition to court costs or any other fee imposed on the defendant.

(f) A community corrections and supervision department shall remit fees collected under Subsection (e) of this section to the comptroller. The comptroller shall deposit the fee in the special revenue fund to the credit of the sexual assault program established under Section 44.0061, Health and Safety Code.

(g) If the judge places on community supervision a person required to register as a sex offender under Chapter 62, the judge shall require as a condition of community supervision that the person pay to the person's supervising officer a fee that equals the actual cost to the applicable local law enforcement authority for providing notice for publication to a newspaper as required by Chapter 62. A community supervision and corrections department shall remit fees collected under this subsection to the applicable local law enforcement authority to reimburse the authority for the actual cost incurred by the authority, as evidenced by written receipt, for providing notice for publication to a newspaper as required by Chapter 62. In a community supervision revocation hearing at which it is alleged only that the person violated the terms of community supervision by failing to make a payment under this subsection, the inability of the person to pay as ordered by the judge is an affirmative defense to revocation, which the person must prove by a preponderance of the evidence.

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Violation of Community Supervision: Detention and Hearing

Sec. 21. (a) At any time during the period of community supervision the judge may issue a warrant for violation of any

of the conditions of the community supervision and cause a defendant convicted under Section 43.02, Penal Code, or under Chapter 481, Health and Safety Code, or Sections 485.031 through 485.035, Health and Safety Code, or placed on deferred adjudication after being charged with one of those offenses, to be subject to the control measures of Section 81.083, Health and Safety Code, and to the court-ordered-management provisions of Subchapter G, Chapter 81, Health and Safety Code.

(b) At any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and cause the defendant to be arrested. Any supervision officer, police officer or other officer with power of arrest may arrest such defendant with or without a warrant upon the order of the judge to be noted on the docket of the court. A defendant so arrested may be detained in the county jail or other appropriate place of confinement until he can be taken before the judge. Such officer shall forthwith report such arrest and detention to such judge. If the defendant has not been released on bail, on motion by the defendant the judge shall cause the defendant to be brought before the judge for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, extend, modify, or revoke the community supervision. A judge may revoke the community supervision of a defendant who is imprisoned in a penal institution without a hearing if the defendant in writing before a court of record in the jurisdiction where imprisoned waives his right to a hearing and to counsel, affirms that he has nothing to say as to why sentence should not be pronounced against him, and requests the judge to revoke community supervision and to pronounce sentence. In a felony case, the state may amend the motion to revoke

community supervision any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The judge may continue the hearing for good cause shown by either the defendant or the state.

(c) In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, court costs, restitution, or reparations, the inability of the defendant to pay as ordered by the judge is an affirmative defense to revocation, which the defendant must prove by a preponderance of evidence.

(d) A defendant has a right to counsel at a hearing under this section.

Continuation or Modification

Sec. 22. (a) If after a hearing under Section 21 of this article a judge continues or modifies community supervision after determining that the defendant violated a condition of community supervision, the judge may impose any other conditions the judge determines are appropriate, including:

(1) a requirement that the defendant perform community service for a number of hours specified by the court under Section 16 of this article, or an increase in the number of hours that the defendant has previously been required to perform under those sections in an amount not to exceed double the number of hours permitted by Section 16;

(2) an increase in the period of community supervision, in the manner described by Subsection (b) of this section;

(3) an increase in the defendant's fine, in the manner described by Subsection (d) of this section; or

(4) the placement of the defendant in a substance abuse felony punishment program operated under Section 493.009, Government Code, if:

(A) the defendant is convicted of a felony other than:

(i) a felony under Section 21.11, 22.011, or 22.021, Penal Code; or

(ii) criminal attempt of a felony under Section 21.11, 22.011, or 22.021, Penal Code; and

(B) the judge makes an affirmative finding that:

(i) drug or alcohol abuse significantly contributed to the commission of the crime or violation of community supervision; and

(ii) the defendant is a suitable candidate for treatment, as determined by the suitability criteria established by the Texas Board of Criminal Justice under Section 493.009(b), Government Code.

(b) If the judge imposes a sanction under Subsection (a)(4) of this section, the judge shall also impose a condition requiring the defendant on successful completion of the

program to participate in a drug or alcohol abuse continuum of care program.

(c) The judge may extend a period of community supervision under this section as often as the judge determines is necessary, but the period of community supervision in a first, second, or third degree felony case may not exceed 10 years and, except as otherwise provided by this subsection, the period of community supervision in a misdemeanor case may not exceed three years. The judge may extend the period of community supervision in a misdemeanor case for any period the judge determines is necessary, not to exceed an additional two years beyond the three-year limit, if the defendant fails to pay a previously assessed fine, costs, or restitution and the judge determines that extending the period of supervision increases the likelihood that the defendant will fully pay the fine, costs, or restitution. A court may extend a period of community supervision under this section at any time during the period of supervision or, if a motion for revocation of community supervision is filed before the period of supervision ends, before the first anniversary of the date on which the period of supervision expires.

(d) A judge may impose a sanction on a defendant described by Subsection (a)(3) of this section by increasing the fine imposed on the defendant. The original fine imposed on the defendant and an increase in the fine imposed under this subsection may not exceed the maximum fine for the offense for which the defendant was sentenced. The judge shall deposit money received from an increase in the defendant's fine under this subsection in the special fund of the county treasury to be used for the same purposes for

which state aid may be used under Chapter 76, Government Code.

Extending Supervision Period for Sex Offenders

Sec. 22A. (a) If a defendant is placed on community supervision after receiving a grant of deferred adjudication for or being convicted of an offense under Section 21.11, 22.011, or 22.021, Penal Code, at any time during the period of community supervision, the judge may extend the period of community supervision as provided by this section.

(b) If at a hearing at which the defendant is provided the same rights as are provided a defendant at a hearing under Section 21 the judge determines that the defendant has not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public, the judge may extend the period of supervision for a period not to exceed 10 additional years.

(c) A judge may extend a period of community supervision under this section only once; however, the judge may extend a period of community supervision for a defendant under both Section 22(c) and this section, and the prohibition in Section 22(c) against a period of community supervision in a felony case exceeding 10 years does not apply to a defendant for whom community supervision is increased under this section or under both Section 22(c) and this section.

Revocation

Sec. 23. (a) If community supervision is revoked after a hearing under Section 21 of this article, the judge may proceed to dispose of the case as if there had been no community supervision, or if the judge determines that the best interests of society and the defendant would be served by a shorter term of confinement, reduce the term of confinement originally assessed to any term of confinement not less than the minimum prescribed for the offense of which the defendant was convicted. The judge shall enter the amount of restitution or reparation owed by the defendant on the date of revocation in the judgment in the case.

(b) No part of the time that the defendant is on community supervision shall be considered as any part of the time that he shall be sentenced to serve. The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision. When he is notified that his community supervision is revoked for violation of the conditions of community supervision and he is called on to serve a sentence in a jail or in the institutional division of the Texas Department of Criminal Justice, he may appeal the revocation.

Sec. 24. Expired.

Secs. 25 to 28. [Blank].

Sec. 29. Repealed by Acts 1995, ch. 76, § 3.15, eff. Sept. 1, 1995.

APPENDIX E

Art. 62.01. Tex. Code of Crim. Proc. - Definitions

In this chapter:

(1) "Department" means the Department of Public Safety.

(2) "Local law enforcement authority" means the chief of police of a municipality or the sheriff of a county in this state.

(3) "Penal institution" means a confinement facility operated by or under a contract with any division of the Texas Department of Criminal Justice, a confinement facility operated by or under contract with the Texas Youth Commission, or a county jail.

(4) "Released" means discharged, paroled, placed in a nonsecure community program for juvenile offenders, or placed on juvenile probation, community supervision, or mandatory supervision.

(5) "Reportable conviction or adjudication" means a conviction or adjudication, regardless of the pendency of an appeal, that is:

(A) a conviction for a violation of Section 21.11 (Indecency with a child), 22.011 (Sexual assault), 22.021 (Aggravated sexual assault), or 25.02 (Prohibited sexual conduct), Penal Code;

(B) a conviction for a violation of Section 43.05 (Compelling prostitution), 43.25 (Sexual performance by a

child), or 43.26 (Possession or promotion of child pornography), Penal Code;

(C) a conviction for a violation of Section 20.04(a)(4) (Aggravated kidnapping), Penal Code, if the defendant committed the offense with intent to violate or abuse the victim sexually;

(D) a conviction for a violation of Section 30.02 (Burglary), Penal Code, if the offense is punishable under Subsection (d) of that section and the defendant committed the offense with intent to commit a felony listed in Paragraph (A) or (C);

(E) the second conviction for a violation of Section 21.08 (Indecent exposure), Penal Code;

(F) a conviction for an attempt, conspiracy, or solicitation, as defined by Chapter 15, Penal Code, to commit an offense listed in Paragraph (A), (B), (C), or (D);

(G) an adjudication of delinquent conduct based on a violation of one of the offenses listed in Paragraph (A), (B), (C), (D), or (F) or for which two violations of the offense listed in Paragraph (E) are shown;

(H) a deferred adjudication for an offense listed in Paragraph (A), (B), (C), (D), or (F);

(I) a conviction under the laws of another state or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of an offense listed under Paragraph (A), (B), (C), (D), or (F); or

(J) the second conviction under the laws of another state or the Uniform Code of Military Justice for an offense containing elements that are substantially similar to the elements of the offense of indecent exposure.

(6) "Sexually violent offense" means any of the following offenses committed by a person 17 years of age or older:

(A) an offense under Section 21.11(a)(1) (Indecency with a child), 22.011 (Sexual assault), or 22.021 (Aggravated sexual assault), Penal Code;

(B) an offense under Section 43.25 (Sexual performance by a child), Penal Code;

(C) an offense under Section 20.04(a)(4) (Aggravated kidnapping), Penal Code, if the defendant committed the offense with intent to violate or abuse the victim sexually;

(D) an offense under Section 30.02 (Burglary), Penal Code, if the offense is punishable under Subsection (d) of that section and the defendant committed the offense with intent to commit a felony listed in Paragraph (A) or (C) of Subdivision (5); or

(E) an offense under the laws of another state if the offense contains elements that are substantially similar to the elements of an offense listed under Paragraph (A), (B), (C), or (D).